TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 58

THE BALTIMORE AND OHIO RAILROAD COMPANY, PETITIONER,

vs.

DORA GOODMAN, ADMINISTRATRIX OF THE ESTATE OF NATHAN GOODMAN, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 20, 1928

CERTIORARI GRANTED JUNE 4, 1928

(21,954)

(31,884)

SUPREME COURT OF THE UNITED STATES

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TRANSCRIPT OF RECORD.

In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 149—Dora Goodman, as Administratrix of the Estate of Nathan Goodman, Deceased, Plaintiff, vs. The Baltimore & Ohio Railroad Company, Defendants.

TRANSCRIPT ON REMOVAL—Filed March 17, 1924. Court of Common Pleas, Montgomery County, Ohio.

No. 53836—Dora Goodman, as Administratrix of the Estate of Nathan Goodman, Deceased, Plaintiff, vs. The Baltimore & Ohio Railroad Company, Defendant.

Before the Court of Common Pleas within and for the County of Montgomery and State of Ohio, at the January Term thereof, which was begun and held at the Court House in the City of Dayton, said county and State, on the 7th day of January, A. D. 1924.

Be it remembered that heretofore, to-wit, on the 7th day of February, A. D. 1924, there was filed in the office of the clerk, petition, clothed in the words and figures following, to-wit:

Plaintiff says that she is the duly appointed, qualified and acting administratrix of Nathan Goodman, deceased, having received her appointment from the Probate Court of Montomery county, Ohio, and that this suit is brought in her representative capacity.

Plaintiff says that on and prior to the 6th day of November, 1923, the defendant, The Baltimore and Ohio Railroad Company, was a corporation which did maintain and operate a certain steam railroad, which extended in part from Dayton, Ohio, to Cincinnati, Ohio, which steam railroad passed through a little village known as Whitfield, which village is located in Montgomery county, Ohio.

Plaintiff further says that on said 6th day of November, 1923, the decedent, Nathan Goodman, was a resident of Montgomery county, Ohio, and that on said date at about 1:45 o'clock p. m. the said Nathan Goodman while operating a truck and passing the crossing of the said defendant in the said village of Whitfield, was struck by a train driven and operated by the said defendant, and was instantly killed. And plaintiff says that the place in the village of Whitfield where said de-

cedent met his death as aforesaid in a place where the railroad train of the said defendant crosses a much traveled road there located.

Plaintiff further says that the said decedent was without fault in the premises, and that the death of said decedent was caused by the carelessness and negligence of the said defendant in this, to-wit: That the said defendant at said time and place was operating its steam railroad train at an excessive, negligent and highly dangerous rate of speed, to-wit: At the rate of fifty-five (55) to sixty (60) miles per hour, and that said defendant failed and neglected to give any warning of the approach of said train and that the said defendant failed and neglected to keep its said train under proper control as it approached the said crossing at said village of Whitfield.

Plaintiff further says that the said defendant did erect or cause to be erected at some day prior to the 6th day of November, 1923, a shanty or building about 200 to 300 feet north of said crossing in said village of Whitfield, which shanty completely obstructed the view of any person on said road as he approached the crossing from the west. And plaintiff further says that on said date in question the said decedent did approach said crossing from the west. And plaintiff further states that by reason of the existence and location of said shanty as stated above, on said date no person traveling on said road from the west could see any considerable distance towards the north, down the track and right of way of said defendant, and by reason thereof such person could not see an approaching train from the north until he was practically upon the tracks of the said defendant. And plaintiff says that although defendant knew, or should have known of the danger to travelers caused by the existence of said shanty or building, that said defndant, nevertheless, permitted the same to remain in such position.

Plaintiff avers that the said Nathan Goodman left surviving him his wife, Dora Goodman, age thirty-eight (38), the plaintiff herein, as his next of kin and only heir at law, who has been injured and damaged by the death of said Nathan Goodman in the amount of thirty thousand dollars ($30,000).

Wherefore, plaintiff as such administratrix, prays judgment against the said defendant in the said sum

of thirty thousand dollars ($30,000) and her costs herein expended.

Mattern, Brumbaugh & Mattern,
I. L. Jacobson,
Attorneys for the Plaintiff.

State of Ohio, Montgomery County, ss.:

Dora Goodman, being first duly sworn, deposes and says that she is the duly qualified and acting administratrix of the estate of Nathan Goodman, deceased, that she brings this action as such administratrix, and that the facts set forth above in the foregoing petition are true as she verily believes.

Dora Goodman.

Sworn to and subscribed before me this 18th day of January, 1924.

(Seal.) I. L. Jacobson,
Notary Public in and for Montgomery County, Ohio.

To the Clerk: Issue summons to the sheriff of Montgomery county, Ohio, to be served on the said defendant and made returnable according to law, endorse action for money only, amount claimed, thirty thousand dollars ($30,000) and costs.

Mattern, Brumbaugh & Mattern,
I. L. Jacobson,
Attorneys for the Plaintiff.

Thereupon, there was issued from the office of the clerk, summons, clothed in the words and figures following, to-wit:

The State of Ohio, Montgomery County, ss.:

To the Sheriff of Montgomery County, Ohio: You are commanded to notify The Baltimore and Ohio Railroad Company, that they have been sued by Dora Goodman, as administratrix of the estate of Nathan Goodman, deceased, in the Common Pleas Court of Montgomery county, and that unless they answer by the 8th day of March, A. D. 1924, the petition of the said plaintiff against them filed in the clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on the 18th day of February, A. D. 1924.

Witness my hand and the seal of said court, at Dayton, Ohio, this 7th day of February, A. D. 1924.

(Seal.) C. D. Hoffman,
Clerk of Court of Common Pleas, Montgomery County, Ohio.

By Geo. Beckner, Deputy.

Afterwards, to-wit, on the 8th day of February, A. D.

1924, there was returned and filed in the office of the clerk, summons, with the following endorsements thereon, to-wit: Received this writ on the 7th day of February, A. D. 1924, and on the 8th day of February, 1924, I served the same on The Baltimore and Ohio Railroad Company, by handing a true copy thereof, with all the endorsements thereon, personally to L. F. Hockett, as regular freight agent at Dayton, Montgomery county, Ohio, of said company. The chairman of board of directors, president, treasurer, secretary, general manager or other special officers of said company not found in my county.

Howard E. Webster, Sheriff.
By Fred S. Wolf, Deputy.

Afterwards, to-wit, on the 27th day of February, A. D. 1924, there was filed in the office of the clerk, petition for removal of cause to the United States District Court, clothed in the words and figures following, to-wit:

To the Honorable the Common Pleas Court of the County of Montgomery, State of Ohio:

The petitioner, said The Baltimore and Ohio Railroad Company, defendant in the above-entitled action, respectfully shows to this honorable court that your petitioner is defendant in the above-entitled action; that said action has been commenced against it in said court by said plaintiff, and that said action is of a civil nature. That said plaintiff in her petition herein claims damages as administratrix of the estate of Nathan Goodman, deceased, alleged to have been caused by the wrongful death of said Nathan Goodman on the 6th day of November, 1923, while operating a truck and passing over the crossing of said The Baltimore and Ohio Railroad Company, defendant, in the village of Whitfield, Montgomery county, Ohio, through being struck by a train driven and operated by said defendant, and instantly killed, claim amounting to thirty thousand dollars ($30,000) and costs, for which said planitiff demands judgment against this defendant; that your petitioner disputes said claim and denies all liability; that the matter in dispute in ths action exceeds the sum of $3000 exclusive of interest and costs; that the controversy in this action and every issue of fact and law therein is wholly beween citizens of different states, and which can be fully determined as between them, that is to say, the plaintiff, Dora Goodman, as administratrix of the estate of Nathan Goodman, deceased, is now, and was at the time of the filing of the petition in this

action, a citizen and resident of the State of Ohio, and the defendant, The Baltimore and Ohio Railroad Company was then, and still is, a railroad corporation duly incorporated under the laws of the State of Maryland, and is a citizen and resident of said State of Maryland; that the time for your petitioner as defendant in this action to answer or plead to the petition in said action has not yet expired, and will not expire until the 8th day of March, 1924, and your petitioner has not yet filed any pleading or in any way appeared therein.

Your petitioner, therefore, prays that this court proceed no further herein except to make the order of removal as required by law and to accept the bond presented herewith and direct a transcript of the record herein to be made by said court as provided by law and as in duty bound your petitioner will ever pray.

The Baltimore & Ohio Railroad Co.,
Petitioner.

Marshall & Harlan,
Its Attorneys.

State of Ohio, Montgomery County, ss.:

A. McL. Marshall, being duly sworn on oath, says that he is one of the attorneys of the defendant in the above entitled cause and of the petitioner in the foregoing petition; that he has read the same and believes the same to be true, and affiant further says that said petitioner is absent from and is a non-resident of the said County of Montgomery, State of Ohio, in which said suit is brought, and that affiant makes this affidavit for the reason that the defendant is absent from and is a non-resident of said County of Montgomery in which said suit is brought.

A. McL. Marshall.

Sworn to before me by A. McL. Marshall and by him subscribed in my presence this 25th day of February, A. D. 1924.

(Seal.) Thomas J. Kelly,
Notary Public in and for Montgomery County, Ohio.

Afterwards, to-wit, on the 27th day of February, A. D. 1924, there was filed in the office of the clerk, bond, clothed in the word and figures following, to-wit:

Know All Men by these Presents: That we, The Baltimore and Ohio Railroad Company of Baltimore, Maryland, as principal, and the United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto Dora Goodman, as administratrix of the estate of Nathan Goodman, deceased, plaintiff in the above entitled cause, her successors, administrators,

and assigns, in the sum of five hundred dollars ($500), lawful money of the United States of America, for the payment of which, well and truly to be made, we and each of us bind ourselves and each of us, our successors and assigns, jointly and severally by these presents.

The condition of this obligation is such that whereas the said The Baltimore and Ohio Railroad Company has applied by petition to the Common Pleas Court of the State of Ohio in and for the County of Montgomery for the removal of a certain cause therein pending wherein Dora Goodman, as administratrix of the estate of Nathan Goodman, deceased, is plaintiff, and the said The Baltimore and Ohio Railroad Company is defendant, to the District Court of the United States for the Southern District of Ohio, Western Division, for further proceedings on grounds in said petition set forth, and that all further proceedings in said action in said Common Pleas Court be stayed.

Now, therefore, if your petitioner, said The Baltimore and Ohio Railroad Company, shall enter in said District Court of the United States for the District as aforesaid, within thirty days from the filing of said petition, a certified copy of the record in said suit and shall pay or cause to be paid all costs that may be awarded therein by said District Court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise shall remain in full force and effect.

Dated February 23rd, A. D. 1924.

The Baltimore and Ohio Railroad Company,
By Morison L. Waite, Its Attorney in Fact.
(Seal) United States Fidelity and Guaranty Co.,
By Harry B. Hupp, Attorney in Fact.

Afterwards, to-wit, on the 27th day of February, A. D. 1924, there was filed in the office of the clerk, order of removal, clothed in the words and figures following, to-wit:

This cause coming on for hearing upon the petition and bond of the defendant herein for an order transferring this cause to the United States District Court for the Southern District of Ohio, Western Division, and it appearing to the court that the defendant has filed its petition for such removal in due form of law, and that the defendant has filed its bond duly conditioned with good and sufficient sureties as provided by law, and that the defendant has given plaintiff due and legal notice thereof, and it appearing to the court that this

is a proper cause for removal to said District Court.

Now, therefore, said petition and bond are accepted, and it is hereby ordered and adjudged that this cause be, and it hereby is, removed to the United States District Court for the Southern District of Ohio, Western Division, and the clerk is hereby directed to make up the record on said cause for transmission to said court forthwith.

Done in open court this 27th day of February, 1924.

Robert C. Patterson, Judge.

Afterwards, to-wit, on the 27th day of February, A. D. 1924, there was filed in the office of the clerk, notice of petition and bond for order of removal, clothed in the words and figures following, to-wit.

To Messrs. Mattern, Brumbaugh & Mattern, and I. L. Jacobson, Attorneys for Plaintiff:

Please take notice that The Baltimore and Ohio Railroad Company, defendant in the above entitled action, will on the 27th day of February, 1924, at 9 o'clock a. m., or as soon thereafter as counsel can be heard, move the court for an order removing said cause to the District Court of the United States for the Southern District of Ohio, in accordance with petition and bond of defendant, copies of which are hereto attached.

Dated this 25th day of February, 1924.

Marshall and Harlan,
Attorneys for Defendant.

Receipt of copy of the above notice and service of same is hereby acknowledged on this 25th day of February, 1924,—also copy of petition and bond.

Mattern, Brumbaugh & Mattern,
I. L. Jacobson,
Attorneys for the Plaintiff.

Clerk's Certificate with Record.

State of Ohio, Montgomery County, ss.:

I, C. D. Hoffman, county clerk of said County of Montgomery, and clerk of the Common Pleas Court in and for said county, hereby certify the above and foregoing to be a full, true and correct copy of the record and the whole thereof in the above entitled suit heretofore pending in said Common Pleas Court, being suit 53836, wherein Dora Goodman, as administratrix of the estate of Nathan Goodman, deceased, is plaintiff, and The Baltimore and Ohio Railroad Company is defendant, said record consisting of the petition filed by said plaintiff in said suit on the 7th day of February, 1924, the summons and return thereof filed in said suit on the 7th day of February, 1924, petition for removal of

said suit to the United States District Court filed by said defendant in said suit on the 27th day of February, 1924, bond for removal, notice of petition and bond, and the order of removal of said suit to the said United States District Court entered of record in said suit on the 27th day of February, 1924, all as appears on file and of record in my office.

Witness my hand and the seal of said court at Dayton, Montgomery county, Ohio, this 28th day of February, A. D. 1924.

(Seal.) C. D. Hoffman,
Clerk of Common Pleas Court, Montgomery County, Ohio.

ANSWER—Filed April 12, 1924.

Now comes defendant and for its answer to the petition of plaintiff says it admits that plaintiff is the duly appointed, qualified and acting administratrix of Nathan Goodman, deceased, and that she was appointed by the Probate Court of Montgomery county, Ohio, and the suit is brought in her representative capacity.

Defendant admits that on or prior to the 6th day of November, 1923, the defendant, The Baltimore and Ohio Railroad Company, was a corporation which maintained and operated a certain steam railroad extending from Cincinnati to Dayton, Ohio, which steam railroad passed through the little village known as Whitfield, located in Montgomery county, Ohio. Defendant admits that Nathan Goodman on said 6th day of November, 1923, was a resident of Montgomery county, Ohio, and while operating a truck and passing over the crossing of the defendant in said Village of Whitfield collided with a train driven and operated by defendant and was instantly killed. This defendant denies that the place where said decedent met his death in the Village of Whitfield as aforesaid is a place where the railroad

Answer.

train of said defendant crosses a much traveled road there located.

Defendant denies that decedent was without fault in the premises, but avers on the contrary that the accident and resulting death of plaintiff's decedent were brought about solely by his own carelessness and negligence in the manner in which he approached and went upon the track of defendant without stopping, looking, and listening, and taking proper care and precaution.

Defendant denies that the death of said decedent was caused by the carelessness and negligence of said defendant; denies that said defendant was operating its train at an excessive, negligent and highly dangerous rate of speed, taking into consideration the fact that this accident occurred in a very small village located in the country; denies that defendant failed and neglected to give any warning of the approach of said train, but avers on the contrary that this defendant did give warning, by whistle and bell, of its approach to said crossing.

This defendant denies that it erected or caused to be erected at some date prior to November 6, 1923, or at any time, a shanty or building at said crossing in said Village of Whitfield, but avers that said shanty was not on the property of this defendant and not erected by it, and that this defendant had no control over same.

This defendant further denies that his shanty completely obstructed the view of any person on said road as he approached the crossing from the west.

Defendant admits that plaintiff's decedent approached said crossing from the west.

This defendant denies that it permitted said shanty or building to remain where it was located or that it had any control over same.

This defendant admits that Nathan Goodman left as surviving him his wife, Dora Goodman.

Defendant denies each and every other allegation in the petition of plaintiff and not herein specifically admitted.

Second Defense.

For a second and further defense to the petition of plaintiff, this defendant incorporates as if herein rewritten all the facts and allegations set out in said first defense, and further avers and says that if this defendant or its agents and employees were negligent in any respect, which defendant specifically denies, plaintiff's decedent, Nathan Goodman, was guilty of negligence in

Entry.

directly contributing to said accident in that he approached and went upon the crossing carelessly and negligently, the cab of his truck being closed and greatly interfering with his view, without taking proper precaution and care to look and listen and stop, if stopping was necessary, in order to view the track before going on same and have opportunity to look and listen, handicapped as he was by the closed cab, the running of his truck and surrounding conditions.

Wherefore and on account of both of the above set out defenses this defendant asks that this petition and case may be dismissed and for judgment against plaintiff for its costs.

Marshall & Harlan,
Attorneys for Defendant.

ENTRY—Filed October 13, 1924.

Upon application of the plaintiff herein and by agreement of the counsel for the plaintiff and the defendant, leave is hereby granted to the plaintiff to amend her petition at bar by inserting in the eighth line of the second page thereof after the word "building," the following words, to wit:

"About two hundred to three hundred feet north off" in place of the word "at."

R. N. Brumbaugh & I. L. Jacobson,
Attorney for Plaintiff.

Marshall & Harlan,
Attorneys for the Defendant.

Approved:
Smith Hickenlooper,
Judge.

ANSWER TO AMENDED PETITION—Filed December 8, 1924.

Now comes defendant and for its answer to the petition of plaintiff says it admits that plaintiff is the duly appointed, qualified and acting administratrix of Nathan Goodman, deceased, and that she was appointed by the Probate Court of Montgomery county, Ohio, and the suit is brought in her representative capacity.

Defendant admits that on or prior to the 6th day of November, 1923, the defendant, The Baltimore and Ohio Railroad Company, was a corporation which maintained and operated a certain steam railroad extending from Cincinnati to Dayton, Ohio, which steam railroad passed through a very little unincorporated village of four or five houses, known as Whitfield, located in Montgomery county, Ohio.

Defendant admits that Nathan Goodman on said 6th day of November, 1923, was a resident of Montgomery county, Ohio, and while operating a truck and passing over the crossing of the defendant in said village of Whitfield, collided with a train driven and operated by defendant and was instantly killed.

This defendant denies that the place where said decedent met his death in the said village of Whitfield as aforesaid is a place where the railroad train of said defendant crosses a much-traveled road there located.

Defendant denies that decedent was without fault in the premises, but avers on the contrary that the accident and resulting death of plaintiff's decedent were brought about solely by his own carelessness and negligence in the manner in which he approached and went upon the tracks of defendant without stopping, looking, and listening, and taking proper care and precaution.

Defendant denies that the death of said decedent was caused by the carelessness and negligence of said defendant; denies that said defendant was operating its train at an excessive, negligent and highly dangerous rate of speed, taking into consideration the fact that this accident occurred in a very small unincorporated village located in the country; denies that defendant failed and neglected to give warning of the approach of said train, but avers on the contrary that this defendant did give warning, by whistle and bell, of its approach to said crossing.

This defendant admits that there was a small shanty located three hundred (300) feet or more north of said crossing, but denies that said shanty completely obstructed the view of any person on said road as he approached the crossing from the west.

Answer to Amended Petition.

Defendant admits that plaintiff's decedent approached said crossing from the west.

Defendant denies that the existence and location of said shanty, on said date, prevented decedent or any person traveling on said road from the west, as decedent was traveling, from seeing down the track and right of way of said defendant a sufficient distance to have enabled him to avoid the accident if he had looked and listened and used ordinary care and precaution, with the conditions surrounding him and with which he was familiar or could have been familiar by the exercise of ordinary care.

This defendant admits that Nathan Goodman left as surviving him his wife.

Defendant denies each and every other allegation in the petition of plaintiff and not herein specifically admitted.

Second Defense

For a second and further defense to the amended petition of plaintiff, this defendant incorporates as if herein rewritten all the facts and allegations set out in said first defense, and further avers and says that if this defendant or its agents and employees were negligent in any respect, which defendant specifically denies, plaintiff's decedent was guilty of negligence directly contributing to said accident in that he approached and went upon the crossing carelessly and negligently, with the train near at hand, in a truck driven by himself, the cab of said truck being closed and greatly interfering with his view and ability to hear and see, without taking proper precautions and care to look and listen and stop, if stopping was necessary, before going on same, in order to view the track and any train which was on same and approaching said crossing and in order that he might have opportunity to look and listen, handicapped as he was by the closed cab, running of his truck, obstruction to his view, if there was any, and surrounding conditions, with all of which facts and conditions plaintiff's decedent was familiar and knew, or could have known by the exercise of ordinary care.

Wherefore and on account of both of the above set out defenses this defendant asks that said amended petition and this case may be dismissed and for judgment against plaintiff for its costs.

Marshall & Harlan,
Attorneys for Defendant.

REPLY—Filed December 11, 1924.

Now comes the plaintiff herein, and for reply to the answer of defendant denies that the plaintiff's decedent was guilty of any negligence whatsoever in the premises; denies that said plaintiff's decedent went upon the crossing carelessly and negligently; denies that the cab of the truck was closed or interfered with his view; and further denies that the said plaintiff's decedent failed to take proper precaution and care in the premises. And further replying the said plaintiff denies each and every allegation of the answer except as heretofore admitted by her to be true.

Wherefore plaintiff asks judgment as in her petition prayed for.

Mattern, Brumbaugh & Mattern,
I. L. Jacobson,
Attorneys for the Plaintiff.

VERDICT—Filed December 12, 1924.

We, the jury, herein do find the issues joined in favor of the plaintiff and assess ($7,000) seven thousand dollars damages.

Signed,
Charles A. Murray, Foreman.

OPINION—Filed January 10, 1925.

Hickenlooper, District Judge:

In this case the plaintiff's intestate met his death at a grade crossing over the defendant's tracks at the hamlet of Whitfield, Montgomery county, Ohio. Such intestate was thoroughly familiar with the surroundings of the crossing. He was driving a Ford truck at a slow speed, estimated to be six, seven or eight miles per hour, as he approached the crossing from the west. The evidence tends conclusively to show that he did not further slacken speed nor stop his automobile until practically at the moment of the accident. The train was coming from a northerly direction at a rate of speed estimated by the crew to be approximately sixty miles per hour. The question of signals of approach were disputed in the evidence, and the issue of negligence upon the part of the defendant was properly submitted to the jury.

The principal issue submitted to the court upon this motion is that the court erred in not directing a verdict for the defendant, upon the ground that the plaintiff's intestate was himself guilty of contributory negligence which directly contributed to produce his injury. For the purposes of this issue it may be conceded that the accident happened in broad daylight on a clear, mild November day; that the record is devoid of any affirmative proof as to whether the decedent looked for approaching trains upon his approach to the track; that there were certain obstructions to the view northward which prevented seeing any great distance up the track, but that from a point eighteen or twenty feet west of the rails a traveler upon the highway could see approximately 1,560 feet from the crossing, or to the whistling post; and that while the decedent did not actually come upon the rails of the defendant, his car proceeded at a uniform rate of speed until it came into collision with the right-hand side of the pilot beam at the forward end of the locomotive. The verdict must also be taken as conclusively establishing negligence upon the part of the defendant company. The aspect of the evidence most favorable to the plaintiff can at most establish that if the decedent looked at all for approaching trains he looked first to the south and when looking to the north the train was already so close that the automobile could not be stopped. The view to the south was not obstructed to the same extent as that to the north, and no explanation is given why a traveler familiar with the surroundings could not have directed his sole attention to the north imme-

diately upon passing the obstruction on that side. There is no question that the collision resulted in the death of plaintiff's intestate. The jury returned a verdict of $7,000.00.

The contention of the railway company is substantially that inasmuch as the law imposes the positive duty upon the traveler on the highway to look and listen for approaching trains before going upon the crossing (see Railroad Co. v. Houston, 95 U. S., 697; Schofield v. C. M. & St. P. Ry. Co., 114 U. S., 615; Northern Pacific Railroad v. Freeman, 174 U. S., 379, 382), and to do this where looking and listening will avail (Philadelphia & R. Ry. Co. v. LeBarr, 265 Fed., 129 (C. C. A. 3); Brommer v. Pennsylvania R. Co., 179 Fed., 577 (C. C. A. 3)), a verdict should have been directed for the defendant at the close of all the evidence. In effect, the contention of the defendant goes to the extent of urging that in no case of a daylight automobile crossing accident, in which a view of the track can be had even though but a short distance from the rails, can there be any recovery.

This contention first suggests to the mind the radical change in the modes of travel in recent years. When the law of negligence was in its formative stage travel was practically altogether by foot or horse-drawn vehicle. At this stage of its development broad general principles were laid down governing the rights and liabilities of railroad and traveler at grade crossings. It was then authoritatively stated that the rights of the traveler and the railway at crossings were "mutual and reciprocal, and that no greater degree of care is required of the one than of the other." The degree of care required of each was reasonable or ordinary care under the circumstances, "such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty." Continental Improvement Co. v. Stead, 95 U. S., 161, 165. It is true that this case concedes to the railway company a right of precedence in the use of the crossing providing reasonable and timely warning of approach is given; but to hold that this question of preference or right-of-way, being conditioned on the giving of proper signals of approach, conversely gives rise to a right of recovery in every case where such signals of approach are not given, is to entirely lose sight of the distinction between negligence and contributory negligence. The giving of signals of approach has to do solely with the negligence of the defendant, while

the duty to look and listen is pertinent solely to the question of contributory negligence. The two should not be confused.

The suggested change in mode of travel, however, is favorable to the contention of the railway company in making inapplicable as authority those decisions which recognize that in the case of a horse-drawn vehicle it is frequently as dangerous to stop in close proximity to the track as it might be to attempt a crossing. This is forcefully pointed out in the case of New York Cent. & H. R. R. Co. v. Maidment, 168 Fed., 21, 23, where the court says:

"When a driver of horses attempts to make a crossing and is suddenly confronted by a train, difficulties face him to which the automobile is not subject. He cannot drive close to the track, or stop there, without risk of his horse frightening, shying, or overturning his vehicle. He cannot well leave his horse standing, and if he goes forward to the track to get an unobstructed view and look for coming trains he might have to lead his horse or team with him. These precautions the automobile driver can take, carefully and deliberately, and without the nervousness communicated by a frightened horse. It will thus be seen an automobile driver has the opportunity, if the situation is one of uncertainty, to settle that uncertainty on the side of safety, with less inconvenience, no danger, and more surely than the driver of a horse."

It is possible that the almost universal use of automobiles and the assurance which the "ordinary prudent" driver feels in his ability to cross quickly and to stop quickly may have established a slightly different standard of care on the part of the traveler, if we are to judge this standard by the act of the ordinarily prudent driver. If, however, there still rests upon the driver of an automobile the duty to look where looking will be effective, and if he is charged with seeing that which he must have seen had he looked, and if (which is not here disputed) obstructions to the view but increase his duty to use care and make almost mandatory the requirement that he either stop or have his car under such control as to be able to stop within a very short distance, in order that he may be sure of his safety, it would appear to this court as a thoroughly logical development of the law that the accident itself is proof positive that the driver failed in some one or more of these obligations so imposed upon him.

Opinion.

This doctrine is practically in effect in at least two circuits. We use the word "practically" because while not adopted in the broad language and effect here stated, the doctrine of contributory negligence in the operation of an automobile has been so applied as to practically lead to such conclusion. See Engstrom v. Canadian Northern Ry. Co., (C. C. A. 8), 291 Fed., 736 (unobstructed view for 63 feet west of track); Bradley v. Missouri Pac. R. Co., (C. C. A. 8), 288 Fed., 484 (unobstructed view for 40 feet east of track); New York Cent. & H. R. R. Co. v. Maidment, (C. C. A. 3), supra (unobstructed view from 8 or 10 feet from track); Philadelphia & R. Ry. Co. v. Le Barr, (C. C. A. 3), supra; Brommer v. Pennsylvania R. Co., (C. C. A. 3), supra, (unobstructed view 30 feet back from track for distance of 1,400 feet).

Attention should also be called to the case of Fluckey v. Southern Ry. Co., 242 Fed., 468 (C. C. A. 6), in which an unobstructed view could be had of the track at a point 40 feet from the rail, and where Judge Denison, speaking for a court consisting of himself and Judges Warrington and Mack, says:

"It is not to be disputed that, if the driver had looked at the first instant when looking would do any good, he would have seen the car coming. He was familiar with the crossing, and knew that, by reason of the obstructions, it was a dangerous crossing and must be approached cautiously. His clear duty was not only to look as soon as he could see, but to have his machine under such control that, if necessary, he could stop before getting into the danger zone. * * * . Under these undisputed facts, there can be no tenable basis for a finding that Mr. Fluckey exercised that degree of care which would be observed by a reasonably prudent man in such a situation."

As has been suggested, the doctrine just announced appeals strongly to this court as the logical sequence of the duties imposed upon the traveler. As was said to the jury in this case, the law does not require a vain act, and no duty to look is imposed where the view is wholly obstructed. To impose a duty to look would seem to require as a necessary corollary that such looking be done where it would be effective, and it would seem equally illogical to presume that the traveler had looked but did not see that which if he had looked he must have seen. We are aware that courts of the highest standing have held that in the absence of

evidence to the contrary there is a presumption, founded upon the natural instinct of self-preservation, that the traveler both looked and listened for the approach of trains (Texas & Pacific Railway Co. v. Gentry, 163 U. S., 353, 366; Baltimore & Potomac R. R. Co. v. Landrigan, 191 U. S., 461, 473, 474; Robbins v. Pennsylvania R. Co., 267 Fed., 671, 673, 674), but that this presumption may be overcome by evidence; Northern Pacific Railroad Co. v. Freeman, 174 U. S., 379, in which there was direct evidence of inattention; Robbins v. Pennsylvania R. Co., 257 Fed., 671 (C. C. A. 6); Evans v. Erie R. Co., 213 Fed., 129 (C. C. A. 6). In view of the burden resting upon the defendant of proving contributory negligence of the traveler (Texas & Pacific Ry. Co. v. Volk, 151 U. S. 73, 77, 78; Central Vermont Ry. Co. v. White, 238 U. S., 507), perhaps the most that can be said in favor of this presumption of due care is that in the absence of all evidence as to how the accident happened such case must be presumed. If the surrounding circumstances clearly show that the approach of the train might have been discovered in time to avoid the collision, such fact would seem sufficient, upon principle, to rebut such presumption of care. See cases already cited and Kallmerten v. Cowen et al., 111 Fed., 297 (C. C. A. 6); Horn v. Baltimore & O. R. Co., 54 Fed., 301; Northern Pacific Railroad Co. v. Freeman, supra, at p. 384; Erie R. Co. v. Weinstein, 166 Fed., 271, 275 (involving degree of care of a minor).

On behalf of the traveler there may be urged the inconsistency between the doctrine which accords to the traveler an equal right upon the crossing, in principle (see the opinion of Mr. Justice Bradley in Continental Improvement Co. v. Stead, supra), and, through application of the doctrine of contributory negligence, places upon the traveler the entire responsibility of the accident in practical application. There would also seem to be an inconsistency in holding that the right of precedence or right-of-way of the railway company is to be conditioned upon the giving of proper signals, and then in practice conferring an absolute right-of-way upon the railway company in every daylight case. We are also met in the application of this doctrine by the inconsistent decisions of this circuit in just such cases. Thus, in the case of Beckham v. Hines, 279 Fed., 241 (C. C. A. 6), the court held that it was error to direct a verdict for the defendant where the condition of the topography allowed a view up the

track only when the automobile was some sixteen or seventeen feet therefrom; and in Lake Erie & Western Railway Co. v. Schneider, 257 Fed., 675 (C. C. A. 6), the court affirmed a judgment against the railway company. See also Robbins v. Pennsylvania R. Co. supra, and Evans v. Erie R. Co., 213 Fed., 129, both of which recognize the possible right to recover in a daylight automobile crossing accident where there is at least the opportunity of a view up the track before passing thereon. In the Evans case this view was after the plaintiff reached a point between ten and thirty-four feet west of the track had the plaintiff awaited the passage of a freight train going in the opposite direction from that in which the train was moving by which he was struck and had he awaited the clearing of smoke and steam. These last-mentioned cases are all inconsistent with the imposition of a positive duty upon the traveler to look "at a time when looking will be effective", and are likewise inconsistent with any doctrine except that in each individual case the care of the traveler must be measured by the standard of care for his own protection which "a reasonably prudent person ordinarily would take in the same or like circumstances, including the use of his faculties of sight and hearing." Flannelly v. Delaware & Hudson R. Co., 225 U. S., 597, 603. In other words, these last cited cases would seem inconsistent with the imposition of any positive and affirmative duty upon the traveler beyond the mere exercise of his faculties of sight and hearing.

The question is directly raised in the present suit, and so often arises in railway litigation, that we consider it advisable to determine it in this instance adversely to the railway company and thus to permit its presentation squarely to the Court of Appeals. In the event of affirmance the plaintiff will not lose the advantage already gained, and the court will not be required to re-try the case. In the event of reversal, the action will be at a practical end, even though final judgment be not entered above. This action is taken although it appears to the court that better reason and the weight of authority elsewhere would seem to demand a new trial and although submission of the case to the jury in this and similar actions is too prone to introduce elements of the doctrine of comparative negligence which should be excluded from consideration.

It is also urged upon the court that error was committed in charging the jury that the statutory requirement as to crossing signals prescribed the minimum of

care to be exercised, and that if the surrounding circumstances required additional or other signals to be given in the exercise of due care, the law imposed such duty upon the defendant company. This position is, we think, in harmony with the requirement of due care under all the circumstances. But see upon this question Evans v. Erie R. Co., supra, at p. 134, and cases there cited.

It is also urged that the court erred in refusing to charge in substance the seventh paragraph of the syllabus in the case of Railroad Co. v. Kistler, 66 Ohio St., 326:

"As a railroad company has no control over the trees, weeds, brush, shrubbery and the like, not on its right of way, it is not required to take such things into consideration when approaching a crossing."

In accordance with the doctrines laid down in the Kistler case the court charged that ordinarily the speed of a train was not to be considered as the predicate of a claim of negligence, but that the conditions surrounding the crossing in question were all to be taken into consideration by the jury in determining whether the company exercised that degree of care which reasonably prudent railway operators would exercise under similar circumstances in the matter of signals of approach and speed of operation. This charge we consider to be in harmony with all the federal decisions cited, and also to be supported, by analogy, by the case of Napier v. Northwestern Ohio Railway & Power Co., decided by the Sixth Circuit Court of Appeals on December 5, 1924. It is true that in the latter case the alleged obstructions to the view were upon the right-of-way of the company, but the doctrine of the case that if obstructions to the view impose a greater degree of caution and care or increased vigilance upon the traveler the court must likewise charge that the defendant was required to use increased or greater care as it approached the crossing would seem applicable to the broader case as well as to the narrower. If the degree of care imposed upon both parties is reasonable care under all the surrounding circumstances, it is essential that all such circumstances, including obstructions to the view, be considered by the jury in determining whether each party has performed the duty imposed. The mere location of the obstruction to view cannot be held to impose a greater obligation of caution upon the traveler without having reciprocal effect upon

Entry.

the care to be exercised, in view of those circumstances. by the railway company.

The motion for a new trial will be overruled and judgment entered upon the verdict.

Jan. 9/1925.

Smith Hickenlooper,
U. S. District Judge.

ENTRY—Filed February 2, 1925.

This day this cause came on to be heard upon the motion of the defendant for a new trial herein, and the same was submitted to the court, and the court upon consideration thereof does overrule said motion of the defendant; to which action of the court the defendant excepts.

It is, therefore, by the court considered, ordered and adjudged that the plaintiff, Dora Goodman, as administratrix of the estate of Nathan Goodman, deceased, recover of the defendant, The Baltimore and Ohio Railroad Company, the sum of seven thousand ($7000) dollars as heretofore found due her by the verdict of the jury in this case, together with her costs herein; to which action of the court the defendant excepts.

R. N. Brumbaugh,
I. L. Jacobson,
Attorneys for the Plaintiff.
Marshall and Harlan,
Attorneys for the Defendant.

Approved:

Smith Hickenlooper, Judge

ENTRY—Filed April 28, 1925.

It is, by consent of the parties, ordered that The Baltimore and Ohio Railroad Company, defendant in the above entitled action, have twenty (20) days from and after the last day of the present term of court, to-wit, from and after May 3, 1924, in which to prepare and file with the clerk of this court formal bill of exceptions in this case, and that the plaintiff shall have five (5) days thereafter in which to file with the said clerk her objections and amendments thereto.

The clerk shall then forthwith forward to his Honor Smith Hickenlooper, District Judge of the United States District Court, Cincinnati, Ohio, said bill of exceptions and amendments thereto, if there be any, for final settlement of the same at such time and place as said judge shall designate, provided that the parties hereto or their attorneys shall have at least three days' notice of the time and place fixed by said judge for the final settlement by him of said bill of exceptions. Such bill of exceptions, when settled, shall be taken and deemed as filed in apt time and during this term, shall be dated as of this term, and in all respects shall be considered the bill of exceptions in this case.

R. N. Brumbaugh,
I. L. Jacobson,
Attorneys for Plaintiff.
Marshall and Harlan,
Attorneys for Defendant.

Smith Hickenlooper,
District Judge.

STIPULATION CONCERNING BILL OF EXCEPTIONS—Filed May 11, 1925.

The proposed bill of exceptions and the proposed amendments thereto having been duly presented by respective counsel and same having been settled and allowed by counsel by agreement, and said amendments having been incorporated in the said bill of exceptions

W. P. Rice.

within due time, it is therefore stipulated and agreed that the foregoing bill of exceptions is correct and that it contains all of the testimony offered and received and a correct reference to all the exhibits introduced and true and correct copies of material parts of the same and of all the proceedings had on the trial of said cause

It is further stipulated that this bill of exceptions as engrossed be settled and allowed by Honorable Smith Hickenlooper, judge of said court, in accordance herewith.

File.

R. N. Brumbaugh,
I. L. Jacobson,
Attorneys for Plaintiff.
Marshall and Harlan,
Attorneys for Defendant.

S. Hickenlooper,
District Judge.

BILL OF EXCEPTIONS—Filed May 11, 1925.

Be it remembered that on the trial of this cause in this court at the November term, A. D. 1924, the Honorable Smith Hickenlooper, District Judge, presiding, when the following proceedings were had, to-wit:

A jury was empaneled and sworn according to law, and thereupon the plaintiff to sustain the issues upon her part, offered the testimony of the following witnesses as her evidence in chief.

W. P. Rice,

called as witness on behalf of plaintiff, having been first duly sworn, testified as follows:

Examined by Mr. Brumbaugh:

My name is W. P. Rice. I reside at present at Whitfield, Ohio, and outside of the few winter months, have

W. P. Rice.

spent nearly all the time at Whitfield for nearly thirteen years. I am a producer of coal and have been for forty years. My residence in Whitefield is directly north or northeast of the road crossing of The Baltimore and Ohio Railroad Company and the road that runs eastwardly into West Carrollton. The east line of my property is within about 60 feet of the railroad tracks. A road, known as the Infirmary road, runs east of my house between the railroad tracks and my property in a north and south direction. The railroad tracks run a little east of north and practically north and south, and the road and tracks run nearly parallel. The right of way of The Baltimore and Ohio Railroad Company joins the Infirmary road at the place where the railroad intersects the road that runs east and west from Carrollton out to Whitfield.

Starting at the road on which this man, Nathan Goodman, was driving at the time of his death, that runs eastwardly and westwardly across the tracks and between the Infirmary road the right of way of this railroad company, a one-story frame building, owned by a Mr. Doyle and operated as a little country store, obstructed the view eastwardly on November 6, 1923. This building was directly on the west line of the right of way and almost struck the Infirmary road on the west side. Approaching this crossing from the west, the view northwardly would be obstructed to the extent of the size of the building. About 60 feet north of this building is Mr. Doyle's residence, then Mr. Mittman, about 100 feet north, and there is a little house known as the car-house and tool-house on the railroad right of way about 80 yards north of the crossing.

Before reaching the Infirmary road, approaching from the west, is my residence, also barns, which are pretty good size, and a one and one-half story tenant residence. Going back to a point about 500 feet west of the tracks of The Baltimore and Ohio Railroad Company, along this east and west road on which Nathan Goodman was traveling, the first building on my property from the west side, is the cottage house which stands about 30 feet from the road; the next is a chicken-house, 60 feet long, and possibly 14x16 feet wide, due north of this cottage house, next is the west side of the barn; due north of the chicken-house is first my hog-pen, about 14 feet square, connected to it on the east side is a corn-crib, 60 feet long, about 6 feet wide and 14 feet high; next to it is a large two-strry wagon-shed, 18 or 20 feet wide and 60 feet long; next

is the main or original part of the barn, which is 60 feet long and about 30 feet wide, two-story. Next, a wing that joins this on the east, about 67 feet long and 36 feet wide, two-story. Directly back, or to the north of this, is my silo, which is 12x30 in height, and east of this is a garage, about 16x20 feet, about 20 feet in depth, north and south along the road. Next is a smoke-house, about 10 feet square; then the building used for a Delco light plant and wash-room, 14x42 feet, extending eastwardly and westwardly; connected to that is the old homestead or residence where I live, consisting of 8 large rooms, with very high ceilings and a porch across the front, the full width, which, I think, is 40x10 or 12 feet deep.

Due north of my property, on the Infirmary road, possibly about 100 feet from the main residence, is a seven-room house. We have several nice maple trees west of the large house, and several cherry trees, and a few small maple, some cherry, a few pear trees, and the southeast corner of the yard which is next to the public road, has shrubbery planted some four or five years ago.. In April, 1924, we had that portion of the shrubbery which we thought obstructed the road practically all cut off.

The buildings that I described, starting with the hog-pen and finishing with the barn, 67 feet long and 36 or 37 feet wide, are all connected. In the next 100 feet west of my house, there is a break of possible 18 feet of a panel of fence that would give one approaching from the west, almost a due northerly view.

The next obstruction to view towards the north approaching the crossing from the west and after passing my house, would be the little store-room above referred to, built by Mr. Doyle. After passing this store-room and stepping on the right of way, if you would look north, you would see the tool-house which, I think, is about 80 yards from the crossing; at that point, my judgment would be, that you could possibly see 150 feet farther north on the main line of the track, standing on the right of way.

From 12 to 15 feet, or half way from the rail to the west right of way line, you could see half a mile to the north.

I have been in and around railroads all my life, but never especially observed the engine on the train that struck Nathan Goodman. My guess would be that the overhand on such an engine would be 22 to 24 inches. On the day of the accident I came to the city to busi-

W. P. Rice.

ness and was within about a mile when the accident happened.

When Mr. Doyle built the little grocery building originally, it faced west, or toward my yard. Since the date of this accident he has turned it, and has the door or opening of it face to the south. This change was made in the spring of 1924. This building is a little longer than it is wide. Before it was moved, the long way of the building stood east and west, now the long way is north and south, as the railroad runs. The change in the location of this building has opened up the gap or view to the extent of the difference between the length and width of the building. I think the building is about 12 by 16, the 16 foot way stood east and west before it was changed, which naturally would make a distance of four feet. I haven't been up to the section-house, which is located about 80 yards north of the crossing, for a long time, but I would say that the tool-house stood possibly 8 or 10 feet from the west line of the right of way, but I am not positive. I would judge that the front of that house is about 15 feet west of the west rail of the track fartherest west. I did not see the accident.

Cross-Examination.

By Mr. Marshall:

The Infirmary road runs due north past my house. Between my house and the little store, located close to the road, at the time of the accident, is a road and also a part of my yard. Approaching this crossing from west and after passing my house and the Doyle residence, there may be a little space where one could look north up the railroad between the Doyle residence and the little [redacted] store-room. I don't want to say how many feet there would be. I think that little store was moved last spring. I don't think it was moved within 30 days after the accident happened. Not being interested, I would not give it special attention.

From the time that the right of way of the railroad was reached in approaching that crossing from the west, you could look 140 or 150 feet north of that tool-house and could see north down the track from the time you reached the right of way. Approaching this crossing from the west, as Nathan Goodman was, when he got within 15 feet of the west rail of the south-bound track, by looking north he could have seen clear to the road crossing or the bridge above, which would be half a mile.

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The curb starts at just about the garbage plant, and would be a few feet over a mile. If a person approaching this crossing on this West Carrollton highway from the west, had looked when 20 feet from the rail, he could have seen four or five hundred feet.

I knew Nathan Goodman. Once in a while if I was home and he was passing, I would buy some fruit from him. He was a trucker and sold to people in our neighborhood. I had seen him on the particular highway where he was afterwards struck, and had occasionally purchased stuff of him before the accident.

The photographs which I now have in my hands and which were presented to me by counsel for defendant to be identified and referred to as Defendant's Exhibits 1, 2, 3, 4, 5 and 6, are all very good pictures of the surroundings and conditions as they were at the time of this accident. Picture No. 1 is very clear to my mind just as it is. Picture No. 2 shows the road known as the Farmersville road, going east and west across the road at Whitfield. It was taken from the east side of the railroad and shows Mr. Schiff's property on the east side and mine on the west and north, that is as it is today and as it was then. Picture No. 3 represents the little store that has been spoken of and the tool-house taken from the south. Picture No. 4 is taken from the north and shows the Billman residence, Mittman's residence, Doyle's residence and mine. Picture No. 5 shows the tool-house from the north of the crossing just as it is. Picture No. 6 was taken from the other side of the railroad and shows the tool-house and rear of the store.

Redirect Examination.

By Mr. Brumbaugh:

The Farmersville and West Carrollton road runs eastwardly and westwardly and that is the road on which Mr. Goodman was traveling on the day when the accident happened. This Farmersville and West Carrollton road is a very heavily used road from early in the spring and as long as the roads are good. Usually that road is good the whole year through.

Thereupon Mr. Rice retired from the witness stand and

C. A. Hoffman

was called on behalf of plaintiff, having been first duly sworn, testified as follows:

Examined by Mr. Brumbaugh:

My name is C. A. Hoffman. I am 52 years of age. I reside at Miamisburg, and have resided there about

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six years. Miamisburg is about two and one-half miles south of Whitfield. Miamisburg is a village of about 5000.

On the 6th day of November, 1923, I was employed by the Dayton Power and Light Company and was boring holes through the cross-arms that go on the poles. On the afternoon of November 6, 1923, I was located about 50 or 60 yards south of the crossing road where the railroad crosses the road in Whitfield and about 40 feet west of the tracks. The railroad tracks run north and south. The road that crossed the tracks runs east and west. I was about 50 or 60 yards south of this railroad crossing, and the pile of cross-arms on which I was working, boring holes, was about 40 feet west of the track. From this point I had a good view of the crossing, and could see a short distance up the track. Curtis Pettigrew, a boy about 19 years, was working with me on that day. I saw the accident to Mr. Goodman. Along the north side of the Farmersville and Carrollton road west of the crossing and and leading up to the right of way of the railroad company, there are several buildings. There is one large residence, and several out-buildings. In fact, it is mostly buildings on the left side of the road to the right of way from a distance, I should say, of 200 yards west of the crossing. Most all of the view is obstructed by buildings, with the exception of one or two small gaps. I took notice of conditions at the time.

On the railroad right of way north of the crossing and on the west side of the right of way there is a tool-house or section-house. I think it is a box-car which sets about on the west line of the railroad company right of way. The front of that section-house is 12 or 15 feet west of the west rail of the southbound track of the railroad. It is located about 200 feet north of the traveled portion of the highway. There is a refreshment stand or little store which sets right up against the right of way just to the left of the crossing as you drive toward the crossing from the west, as Mr. Goodman was driving that day.

In addition to the buildings heretofore mentioned and before you come to a point where the little store interferes and between the Rice residence and the store, there is a building that sets back, a dwelling in which Mr. Doyle lives. I also observed a pear tree and an apple tree in the Doyle yard, and in the corner of the Rice yard is a very bushy shrub of some kind, about 10 feet high, which spreads out some, besides a

few other trees also in the yard. A limb or two of one of the Doyle trees extends out over the right of way and a little past the section-house. The section-house is on the west side of the right of way, and the Doyle residence and yard are still further west. The Doyle yard adjoins the railroad right of way, and the tree referred to is in the Doyle yard.

As you approach the track and look over the right of way towards the section-house, the limbs of this Doyle tree, which stands between where you are standing and the section-house, extends out before this end of the section-house and a little past the section-house towards the tracks of the railway company. If one approached this crossing on the 6th day of November, 1923, from the west and looked northwardly up the right of way, I think this limb would to some extent interfere with the view. When I first observed Nathan Goodman on this 6th day of November, 1923, he was approaching the crossing about probably 40 feet from the crossing, driving a Ford truck. I think it was a ton truck and it had a closed cab extending back probably six feet behind the seat, with corner posts that run up, and curtains on the side. The sides of this vestibule or cab that was over the driver's seat, up even with his face, were glass, and the rest perhaps was wood, frame of some kind. From the front of the truck back to where he would be sitting at the wheel, would be about six feet.

Just before I noticed Goodman approaching and just before I saw the train, I heard a whistle; the whistle was indistinct, but I heard it and when I saw the train coming a few minutes later I recognized the fact that I had heard a whistle and took notice of the fact. At the time I heard the whistle, I could not see the train. The whistle was indistinct, and I could not tell definitely from what direction it was coming. It sounded a great ways off.

I had been working around this crossing six or eight days. The New York Central or Big Four Railroad is also in that vicinity, and whistles from that railroad at times were carried over to where I was working. After hearing this indistinct whistle, presently I turned my head a little to the right and saw the smoke of the train approaching and heard it approaching. At the same time I saw this truck driving straight to the corner. That was when I first saw the truck. I don't think I had seen the truck before that. That is the first time that I remember of taking notice that there

was a truck there. At that time the truck on the road was about 50 feet from the crossing. We usually turned around to watch a train go by, and as I recognized the fact that there was a train coming, I turned around a little more to see it approach and also at the same time I was attracted by this truck, saw the truck going slowly up the grade toward the track, and as I looked the train came into position where I could see it distinctly running toward the crossing. Well, the truck kept on at the same rate of speed, slowly approaching the crossing, and, of course, the train coming at a high rate of speed, anywhere from 50 to 60 miles an hour.

From the time I observed Goodman's truck, about 40 or 50 feet away from the crossing, there was no warning signal that I heard until the train blew just before it struck the truck. I would say that the train was maybe 100 feet from the crossing, anywhere from 50 to 100 feet from the crossing at the time the whistle blowed just before the crossing, and that this whistle was blown about a second before the crash. At the time this last blast was given, the train was between the section-house and the crossing. Preceding this blast, this engine did not give any warning signal that I heard. Of course, the bell might have been ringing and I wouldn't have heard that, that is, might not have noticed it, but I don't remember anything except the whistle. There is no crossing bell signal at the crossing.

From my observation in and around the crossing, the view of the track increased gradually as you approached from the west, and I suppose that 20 feet from the crossing you could see a short distance above the section-house. As you went farther west, say 22 or 24 or 26 feet, your view up the track northwardly would decrease. I would think that a person would have to be within about 22 or 25 feet from the west rail of the southbound track before he could see beyond the section-house. The blast I heard near the crossing was a loud screeching blast. The first one I just remember hearing indistinctly. This blast was loud.

From a point 22 feet west of the west rail of the south-bound track, you could see north past the section-house 100 to 150 feet. When within 15 or 18 feet of the track, your view to the north is lengthened. I saw the smoke of the engine when it was over the section-house before it came into view from my position. I saw this smoke and heard the train before it came into view. I think I was about on the line within 20 feet west of the track which would give me a view of perhaps 200

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feet beyond the section-house northwardly, so that when the train first came into my view, it was about 200 feet north of the section-house. I observed the smoke coming from the engine of the train slightly before the train itself came into view. I saw the train and truck come together. It seemed to me that the wheels of the truck had just about reached the rail when the right hand side of the engine struck it simultaneously; I should say that they came together, of course, one moving slow and the other moving fast. That is the way it looked to me.

The train proceeded about a quarter of a mile south before it came to a stop. When we found Mr. Goodman, he was dead. The wreckage was carried in a southern direction along the track. Approaching this crossing from the west on this highway, there is a grade of about three feet in the last 40. The condition of the road is good. At the time of this accident, the house used by Doyle as a grocery and refreshment stand faced west; it faces the south now. As it stood then, it would have obstructed the view a little more, whatever the difference is between its width and length.

Cross-Examination.

By Mr. Marshall:

Pettigrew and I were standing on the ground about 40 feet west of the south-bound B. & O. track. I heard an indistinct whistle a short time before I saw this train. I heard the train running and saw the smoke of the train before the train actually came into view.

My attention was attracted to Nathan Goodman, the driver of this truck, by the fact that I saw a train coming and him approaching the crossing about that time. He was then about 40 feet from the crossing. From that time up to the time the accident occurred, Nathan Goodman continued to drive his truck at about the ame speed right up to the track. During all of that period this train and smoke were in my sight. I was located from 50 to 60 yards farther south of the place where this accident occurred than Goodman was located at that time. I was from 50 to 60 yards farther away from the train than Nathan Goodman was located on the road.

Just a short time before the train and truck come together, I heard another whistle, and this other whistle was sounded at some point between the place where the accident occurred and the tool-house. My best judgment is that this train was about 100 feet north of the crossing when I heard this second whistele. From

the time that Nathan Goodman, driving his truck, got within 20 feet of the west rail, he could have seen a train coming north of the tool-house at least 150 feet, and the closer this particular train was to the crossing, the farther Nathan Goodman could be away from the crossing and see the train up to any point where that little building would have interfered with his view. If that train was within 300 feet of the crossing at the time Nathan Goodman passed that little store building, he could have seen the train coming if he had looked north from the time he passed that building.

When I saw this truck going up to the crossing, it was running about five miles an hour or something like that. The last 40 feet he would have to go up a grade of about three feet. At this particular point there is no fence on the right side, and the other road that comes in from the north is on the north side, and the little building sets back there also, so there is really no fence on either side of the highway at this place. The space is open especially on the south, it is entirely open and open on the north because of that other little road that intersects the west-bound road on the north, so there isn't really a fence, the highway is wide there, plenty of room.

Approaching from the west toward the crossing, as Nathan Goodman was doing that day, there was nothing to prevent his knowing that a railroad track was near at hand. The tracks were in plain sight of him as he approached. The train was running from 50 to 60 miles an hour, and the truck about five miles an hour, so that the train was running from 10 to 12 times as fast as the truck. If the truck was running one-tenth as fast as the train, the train must have been 200 feet north of the crossing when the truck was 20 feet away from the crossing. If the train was running 12 times as fast as the truck, the train must have been 240 feet north of the crossing when Nathan Goodman was within 20 feet of the west rail of the south-bound track. At that time the train was in plain view and must have been in plain view of Nathan Goodman when he was 20 feet from the track, if the train was then 200 or 240 feet north at that time.

Thereupon C. A. Hoffman retired from the witness stand. A recess was taken until two o'clock in the afternoon of the same day, December 11, 1924, at which time the trial proceeded as follows:

Curtis Pettigrew

was then called as witness on behalf of plaintiff, having first been duly sworn. He testified as follows:

Examination by Mr. Brumbaugh:

I am nineteen years of age, and reside at Miamisburg. At the present time I am employed by my father. In November of 1923 I was employed by The Dayton Power and Light in boring holes in cross-arms.

On November 6, 1923, I was at Whitfield, right south of the Farmersville road, along the railroad, working with Mr. Hoffman, who testified heretofore in this case. I had been working along the right of way of The Baltimore and Ohio Railroad in that vicinity about six or seven days prior to November 6, 1923, and was familiar with the general surroundings at the crossing. I was the length of a cross-arm or about six or eight feet from Hoffman, facing the northwest.

I first saw Goodman, the man who was afterwards killed, when he was coming down just at the west edge of the Rice farm, going east on the Farmersville road. He was in a Ford ton truck, with a closed cab on it and a top running back over the bed of the truck, with the side curtains on it. I would judge he was about 500 feet from the crossing when I first observed him, that I am not sure. He was at the first building on the Rice farm approaching the crossing from the west. I saw the collision occur between the railroad train and his truck. When I first saw the train it was between the little grocery and that section-house which is about 150 to 200 feet north of the crossing.

It was right there where it blew the shrill whistle. I was watching Mr. Goodman drive his truck up the road. I knew him. I wanted to see which way he was going. I just happened to see him and the train both at the same time. I had not heard or seen anything of this train until that time.

The weather had warmed up, and it was a nice day, and right about noon. In the morning it had been bitey. As I observed the automobile truck and the engine come together, it looked to me as though the wheels of the truck and the cylinder of the engine came together. I did not hear anything of the train at all until it got down to the crossing. Just preceding the accident, Mr. Hoffmon and I were taking cross-arms down off the pile to bore holes in them, using a brace and bit. I do not know how far we were west of the south-bound railroad track, but I think we were about 30 or 40 yards, or feet, and about 70 yards south of the railroad crossing, right between some box cars, along

Curtis Pettigrew.

the right of way, that are fixed up for people to live in.

There was nothing to obstruct my view of the crossing. I was a little more west than Mr. Hoffman, so that more of the little grocery would be between me and a view north on the railroad tracks than was between Mr. Hoffman. There was nothing that I know of to obstruct my hearing, and I believe I hear pretty well. When I first saw this locomotive, Mr. Goodman was just about right where he could see it, about 15 or 20 feet back. He was right there at the railroad property where it begins. I would say that Mr. Goodman was approaching the railroad tracks, in his truck, about six or seven miles an hour and that the rate of speed he was going up the grade to the tracks was about half the speed he was going when three or four hundred feet from the crossing.

Cross-Examination.

By Mr. Marshall:

I first saw Goodman when he was about five hundred feet from the crossing, and he continued to run his truck right on up to the crossing, running about six or seven miles an hour as he went up the grade and on the crossing.

When I first saw the train Goodman was 15 or 20 feet west of the rail of the south-bound track, and at that time if he had looked to the north, the train was in plain sight. This truck had a closed cab, with a body going back, with a top over the body, and it had sliding doors like all Ford ton trucks.

I was about three or four feet farther west of the south-bound track than Mr. Hoffman, and we were both workng for the Dayton Power and Light Company at the time. Shortly after the accident, I signed a paper which Mr. Hoffman had written out, and at that time told the man who presented it to me that it was all right, except that I did not hear a whistle. We did not both look up together and see the train; he could see it before I could because he was up farther toward the track. I had to wait until the train got a little piece the other side of the store. I could see the driver when he first came up to the end of the farm, but after he got up to the crossing I could not see him because of his being in the closed cab of the truck. The door on the side towards me was closed. I couldn't say as to the door on the other side, whether it was closed or not. I believe that Mr. Goodman could see as soon as he got by that little store, and when 20 feet west of the crossing he could have seen the train if he had looked to the

Curtis Pettigrew.

north, at least as far as the tool-house. I do not know just how far the east side of the tool-house was west of the west rail of the south-bound track, but there was considerable space.

I had known Nathan Goodman personally at one time when I worked in a garage, but this was the first time I had seen him in the vicinity where I was working. There is a grade of about three feet up to the railroad tracks, and the tracks are in plain sight as you approach from the west. There is a sign which says "Railroad Crossing" on the right hand side of the road going west, which sign is about eight feet high.

Redirect Examination.

By Mr. Brumbaugh:

The truck was a right hand drive. From the position I was in I observed the truck coming towards the railroad and could look through the windshield and see Mr. Goodman. When the truck came up parallel with me, going eastwardly, I was looking at the right hand side of the truck. From that position I could not state as to whether the door on the left hand side of the truck by the driver's seat was closed or not.

Further Cross-Examination.

By Mr. Marshall:

At the time I made a statement, I didn't say anything about the whistle blowing. I said I didn't hear a whistle, and I didn't. When Mr. Hoffman saw the truck, no doubt, the truck was about 60 feet west of the crossing. I saw the truck from the time it could be seen—from the time it came from back of the house. I saw it clear up until it was struck, and I heard no whistle until that engine got up there and gave a shrill whistle. That was the only whistle that was blown that I heard. I heard the train give this shrill whistle when the truck was just up where it could see. Goodman was seated about six or eight feet from the front end of the truck, and the truck was about 13 or 14 feet from the west rail at that time. At the time of making this statement, I did say that on account of the trees and that store there I could not see the train; I didn't say anything about the whistle. I said Hoffman heard the whistle, and I didn't hear any whistle until the shrill blast.

Mrs. Dora Goodman.

Thereupon Curtis Pettigrew retired from the witness stand and

Mrs. Dora Goodman,

caleld as a witness on her own behalf, having been first duly sworn, testified as follows:

Examined by Mr. Brumbaugh:

My name is Dora Goodman. I am the wife of Nathan Goodman, who was killed at Whitfield crossing on November 6, 1923, and am administratrix of his estate. We had been married about six years prior to his death. He was thirty-eight years old at that time and I was thirty-five years old. He was in good health and engaged in the fruit and vegetable business, buying and selling them at retail. He did not have a store, just went from place to place peddling as a huckster. His average earnings were from forty to forty-five dollars a week. We had no children. I am now tending market.

Cross-Examination.

By Mr. Marshall:

My husband was a huckster and went from place to place around in the country selling at retail. His eyesight and hearing were very good. On the day of the accident he had a one-ton Ford truck, with a closed cab. On the day of the accident he had on this truck apples, grape-fruit and potatoes. He started from Dayton on that day. I do not know where he went in his visits. I do know that he was in the retail business and that he started out on that day selling at retail and that he was in the habit of going out each day and selling at retail.

Thereupon Mrs. Goodman retired from the witness stand.

Mr. Brumbaugh then introduced the mortality tables, showing under the Carlisle table an expectancy of life of 28.96; under the combined or seventeen offices' experience table, 28.72 years; under the American experience table, 29.62 years; under the thirty offices' experience, 29.96 years; and under Farr's table No. 3, 27.39 years.

Thereupon plaintiff rested her case and the foregoing constituted all the evidence offered and introduced in chief by plaintiff.

Thereupon counsel for defendant, immediately at the close of all the evidence offered and introduced by plaintiff and after plaintiff had rested, moved the court to direct a verdict in favor of defendant, for the reasons:

J. E. Mittman.

1. That the plaintiff has failed to produce any evidence proving or tending to prove any negligence on the part of defendant; and

2. Because the contributory negligence of plaintiff appears as a matter of law.

Whereupon the court overruled the motion; to which ruling of the court counsel for defendant at the time excepted.

The defendant, to sustain the issues upon its part, then through its counsel offered the testimony of the following witnesses as its evidence in chief.

J. E. Mittman,

called as witness on behalf of defendant, having been first duly sworn, testified as follows:

By Mr. Marshall:

My name is J. E. Mittman. I have lived at Whitfield twenty-six years, and am in the retail coal business, and was on November 6, 1923. My residence is about 350 feet north of the crossing on the Infirmary road.

On November 6, 1923, the day of the accident, my wife and I were just starting from the garage to go to the election, and were between the garage and the shop on my own property. I have a driveway leading out on to this Infirmary road, and was just backing out and between the shop and shed when the train passed my house. Trains are so common that I don't hardly ever observe them. We heard a crash but did not realize what it was before we got on the road. I would not testify as to signals, because I hardly observe the signals, the trains being so common to me that I don't pay any attention to signals. I wouldn't testify whether there was a signal given or not. Personally, I didn't hear it. I first observed the truck after the accident.

I knew Nathan Goodman and had dealt with him. At certain seasons of the year he would visit us frequently, and this was usually in the fall of the year. About two weeks before this accident happened, he visited us frequently. Shortly after the accident I was visited and asked for a statement and gave one. I think there is something wrong in the statement in regard to the signals. I believe I stated at that time that I couldn't testify whether it whisled or not; it is pretty hard for me to tell whether the train whistled or not; it is pretty hard for me to tell whether the train whistled when I am driving an old "flivver" or backing one out.

F. O. Miller.
Cross-Examination.

By Mr. Brumbaugh:

My wife was with me on this day. I just backed out of the garage as I usually do, and drove out, and she got in, and we started out on the Infirmary road. My house is between the railroad right of way and the Infirmary road, about three hundred feet north of the Farmersville and West Carrollton road. We heard the crash before we got out on the Infirmary road and when we were between the garage and shop on my property.

I would not testify that there was a whistle blown or not preceding the crash, and I did not state to the claim agent of The Baltimore and Ohio Railroad Company either that I heard a whistle or that I did not hear a whistle.

Thereupon J. E. Mittman retired from the witness stand, and

F. O. Miller,

called as witness on behalf of defendant, having been first duly sworn, testified as follows:

Examined by Mr. Marshall:

My name is F. O. Miller. I live on Price Hill, and have lived in Cincinnati about forty-eight years. I am a locomotive engineer and have been since 1885, having been employed on the old C. H. & D. and Baltimore and Ohio Railroad for forty-two years. I had been on the run that I was on at the time of the accident fourteen years. August Florine was my fireman and William Morgan conductor.

The accident happened about one twelve or one fourteen; we were a little late. As I approached the Whitfield crossing that day I sounded the regular crossing whistle at the whistling post, which is eighty rods from the crossing: two long and two short blasts of the whistle, and between that point and the crosing, as a safety whistle, I whistled one more crossing whistle, two long and two short blasts of the whistle. I first saw that truck after I had passed the section-men's tool-house. The truck was coming from the west, going east. I did not see anything of the truck until the truck was right up to the rail. I immediately applied the brakes in the emergency position; there was no opportunity to stop. The truck struck the side of the engine, what we call the buffer beam. The pilot was fastened to this buffer beam. It is set into the frame, and the pilot is fastened on to that. This pilot beam extends thirty inches from the rail, and this truck hit the buffer beam on the end. The pilot, or cow-catcher,

F. O. Miller.

as it is commonly known, was not damaged at all. When I saw the accident was inevitable, and in order to keep from getting hit myself, I put my body inside the cab and at the same time had hold of the whistle rope. There is a storm window at the side, and something flew up and hit it and broke the storm window on the side, breaking the pipes on the side of the cab.

The automobile truck slued right around and got caught into the train between the first and second car on the west side. As I approached the crossing, I was looking straight ahead and running between 55 and 60 miles an hour, which is the regular and ordinary speed of that train. The part of the automobile which flew between the train, caused it to become uncoupled between the first and second car. We had a standard bell on that engine, and it was ringing all the time. The bell was started at Dayton by me and was still ringing when we stopped. The train ran about ten car lengths beyond the crossing, the rear of my train being about five car lengths over the crossing. We had five cars on that train averaging between 85 and 90 feet. I applied the brakes as soon as I saw the truck.

According to the statistics of the Westinghouse Air Brake Company, in making tests, 1600 feet is a good stop running at 60 miles an hour.

We had a good whistle, what we call a chime whistle, on that engine, it being the standard whistle on our passenger engines.

Cross-Examination.

By Mr. Brumbaugh:

I was going close to 60 miles an hour. When at the whistling post, 80 rods distant from this crossing, I gave the regulation crossing whistle. My train ran from the whistling post to just before I got to the crossing at practically the same rate of speed. It is a straight track, and the rails and road-bed are good. I was practically upon this truck before I saw it, and after I saw it there was nothing to be done to prevent the accident. Running at 60 miles an hour would carry us 88 feet a second, and to run the 1320 feet from the whistling post would require just 15 seconds at that rate. There is a tool-house for the section men close to 300 feet north of the crossing, and between the section-house and west of the section-house off the right of way, there are two dwelling houses between the section-house and the crossing. A little grocery is just west of the right of way and northwest of the crossing.

Coming straight down the track to the south, if I de-

F. O. Miller.

sired to have some view of this east and west road, I could possibly have seen within 40 or 50 feet of the track to the west of our right of way.

On the day of the accident I was looking straight down the track, as I was required to do, sitting on the right hand side of the cab. My vision took in the width of the right of way and anything that might be within, say, 25 feet of the track.

As I testified heretofore, I gave the regular crossing whistle at the whistling post 1320 feet away and then gave one more signal after that. The second whistle I referred to was not the one which was blown just before the accident. I saw the collision was inevitable. When I leaned in the cab to keep from getting struck, my fireman called my attention to the fact that I blew another whistle. The whistle which I blew unintentionally at this time was not the second whistle. The second whistle I blew between the whistling past and the crossing. This second whistle was blown in the vicinity of and north of the section-house. Sitting in the cab, my eyes would be about nine feet above the rails. The buffer beam referred to extends about 30 inches outside of the rail, so that an automobile which got within two and one-half feet of the west rail of the south-bound track would be struck by the buffer beam.

The engine bell was ringing that day continuously all the way from Dayton to Cincinnati, except when we stopped for water or coal. It rings automatically by air. There is a speed recorder on this engine which shows you how fast you are going. If we exceed the speed limit, we are apt to hear about this and be disciplined.

Redirect Examination.

By Mr. Marshall:

Referring to the whistle just before the accident, I evidently had hold of the rope which is attached to the whistle, which is in the top of the cab, when I ducked my body in to keep from getting struck. The fireman tells me I blew the whistle at that time. That was not the whistle which I testified to having blown between the regular whistling post and the crossing. There was no intention on my part of blowing that blast of the whistle just before the accident.

Thereupon F. O. Miller retired from the witness stand. At this point a short recess was taken, after which the jury were returned to the jury box and the trial proceeded as follows:

William M. Morgan, Sr.,

called as a witness on behalf of defendant, having been first duly sworn, testified as follows:

By Mr. Marshall:

My name is William M. Morgan, Sr. I live at Norwood, and am a passenger conductor on the Baltimore and Ohio. I took my first passenger train out January 3, 1896.

On November 6, 1923, I was conductor of the Baltimore and Ohio Railroad train 55, when an accident occurred at Whitfield. F. O. Miller was my conductor and Guy Fayne was the brakeman and J. K. Burke was the flagman. The train consisted of five cars averaging from 75 to 90 feet each. The train was equipped with high speed air brakes. I was on the inside of the train. I observed that my engineer sounded the regulation crossing whistle, then he sounded a second crossing whistle, two long and two short.

After the accident I immediately went back to where it occurred. Just before the accident occurred I heard one loud blast of whistle and felt the emergency brake. I didn't pay any particular attention to how far the train went by the crossing, but I would judge about 12 or 15 car lengths. There was a mark on the end of the pilot beam of the engine, showing where it had been struck by the truck. There were no marks on the pilot. From the pilot beam to the point of the cowcatcher or pilot, I would judge, would be about three feet. Something from the truck went in between the combination smoker and ladies coach, catching hold of the drawbar lever and opening the lug and parting the train.

Cross-Examination.

By Mr. Brumbaugh:

I am not sure that this disengaged the air; it does not always do that as we have safety chains in there which hold them together. I was in charge of the train and the safety of the passengers and condition of the equipment, and knew that an accident had happened. Just at that time I did not know that the train had come uncoupled, but did learn that before the train started away. I wasn't over at the front end.

There is a river bridge in the neighborhood of half or three-quarters of a mile north of Whitfield. After we came through that bridge I remember of the engineer sounding the regular whistling post whistle. I also remember of another crossing whistle being sounded before we got to Whitfield crossing. I usually hear all the crossing whistles and can remember hearing this

August Florine.

going into Miamisburg. I had just completed working my train when I heard this first whistle, and had started to the end of the train. I felt the air brakes go on and after the train came to a stop was informed by my flagman that we hit an automobile. I was either in the parlor car or dining car when I heard the whistle at the whistling post. I am not sure that I was in the same car when both whistles were sounded.

Thereupon Mr. Morgan retired from the witness stand, and

August Florine,

called as a witness on behalf of defendant, after having been first duly sworn, testified as follows:

Examined by Mr. Marshall:

My name is August Florine. I live at Cincinnati, and am a railroad fireman on the Baltimore and Ohio, having worked for the B. & O. for several years and for the Seaport Airline for three years.

On November 6, 1923, I was fireman on engine 55, my engineer being F. O. Miller. An accident occurred on that date at Whitfield crossing, in which Nathan Goodman was killed. As we approached the crossing I was looking straight ahead on the left side and the engineer was on the right side. Right after passing over the bridge he gave two long and two short blasts of the whistle and as he got to the crossing he put the air in the emergency and I looked over and he ducked back here to keep from getting hurt. He had hold of the whistle string at the same time, and when he ducked in he pulled the whistle string and blew the whistle. This last whistle was blown right at the accident. Our train was running between 50 and 55 miles an hour. It was equipped with a regular standard bell, operated automatically by air. The bell was started ringing at the station in Dayton and was ringing as it approached and went over Whitfield crossing, and was still ringing after we stopped.

After the accident I went out and looked at the engine. The truck came from the west and hit the pilot beam. I did not see the truck before the accident. When the engine was struck the truck knocked a couple of our pipes off.

Cross-Examination.

By Mr. Brumbaugh:

I do not remember the kind of day, or the condition of the pike. I do recall there was a second whistle blown for this crossing as I was in the engine and heard it and heard it and was looking straight ahead. I do not know

Walter Cook.

where the sectionhouse is that stands on the railroad right of way north of the crossing. The fireman hasn't any time to look for those things. I do not know how close the engine was to the crossing when the second crossing whistle was given, but this second crossing whistle was given between the first whistle and the crossing. When the crash came the engineer had his hand on the rope of the whistle, that I saw with my own eyes.

Thereupon August Florine retired from the witness-stand, and

Walter Cook,

called as a witness on behalf of defendant, having been first duly sworn, testified as follows:

Examined by Mr. Marshall:

I am Walter Cook, and I live at Hamilton, Ohio. I am supervisor of tracks of The Baltimore and Ohio Railroad, and have been employed on the Baltimore and Ohio Railroad Company and C., H. & D. thirty-seven years. I have charge of the tracks at Whitfield, where the accident occurred, and the track foreman is under my charge.

No changes whatever have been made on the right of way since the day of this accident, except service ditch was put in on the east side of the track north of the crossing to let the water run away from the track. The filling station or little grocery store is not on the right of way. There have been no changes in the fences, unless there have been a few iron posts driven in when the wooden posts were burnt off, but I couldn't say whether that was done or not. There are two tracks over and approaching Whitfield crossing.

The B. & O. right of way is 60 feet from the right of way fence to the right of way fence. The railroad tracks are level. It may fall a little to the south. The highway is three or four feet lower than the track when 30 feet west of the railroad track. On the east side, I judge, the highway is eight or ten inches lower. The filling station or grocery has been turned around since November 6, 1923, and is right up against the B. & O. right of way fence at the present time. On November 6, 1923, it was 12 to 18 inches west of the right of way fence. The tool-house north of Whitfield crossing is located on the line of the west right of way fence, and the east side of this tool-house is 15 or 16 feet from the west rail of the south bound track, and the south bound main track is the west track and the one you would reach first in going up from the highway on the west.

J. K. Burke. Howard A. Murray.

Thereupon Mr. Cook retired from the witness stand, and

J .K. Burke,

called as witness on behalf of defendant, having been first duly sworn, testified as follows:

Examined by Mr. Marshall:

My name is J. K. Burke. I have lived at Glendale, Ohio, all my life. I am a brakeman and flagman and have been with the Baltimore and Ohio and C. H. & D. Railroads for about thirty-six years.

On November 6, 1923, I was flagman on train 55, when Nathan Goodman was struck and killed at Whitfield crossing. William Morgan was conductor, and F. O. Miller, engineer of this train. There are two tracks at that point; we were on the south-bound, on the west side, and the north-bound is on the east side. As the train approached Whitfield crossing that afternoon and after we had gone through Possum Run bridge, I heard the crossing whistle blown and thereafter an awful shriek of the whistle when the accident happened. The train ran about three train lengths beyond the Whitfield crossing. Immediately after the train stopped, I went back to protect the rear of the train. When I got off the end of the car the conductor was getting out the end of the other car ahead and I hollered to him that we hit something, and I kept going back, going nearly to the bridge. I did not see the accident.

Cross-Examination.

By Mr. Brumbaugh:

At the time of the accident I was in the last or rear car of the train as flagman. My duty was to protect the rear of the train. I had nothing to do with collecting fares or handling passengers. I am required to be always on the alert.

Thereupon J. K. Burke retired from the witness stand, and

Howard A. Murray,

called as a witness on behalf of defendant, having been first duly sworn, testified as follows:

Examined by Mr. Marshall:

My name is Howard A. Murray. I am a commercial photographer and have been since 1914, and live at Hamilton, Ohio.

On November 13, 1923, at the request of the Baltimore and Ohio Railroad, I took the photographs of the scene of the accident at Whitfield crossing which you have just handed to me, numbered one to six inclusive. I also made the record on the back of these

photographs. When I photograph this type of work I use a steel tape and measure everything off exactly and mark it off in a note book and it is transferred to the photograph after it is finished, and followed the same plan with these photographs, and these correctly represent conditions on November 13, 1923, as photographed by me. The notations set out on the back and signed Howard A. Murray, photographer, were made by me. The photographs were taken at Whitfield, the measurements are correct, and that is my signature on each photograph.

In taking photograph referred to as defendants Exhibit No. 1, my camera was about in the middle of the roadway looking north toward Dayton, 51 feet west of the south-bound main track, facing north.

Thereupon counsel for defendant offered in evidence the photograph so identified by the witness, which photograph is submitted herewith and made part of this record, marked Defendant's Exhibit No. 1.

In taking the photograph referred to as defendant's Exhibit No. 2, my camera was situated in the center of the road east of the crossing facing west, looking across the crossing.

Thereupon counsel for defendant offered in evidence the photograph so identified by the witness, which photograph is submitted herewith and made part of this record, marked Defendant's Exhibit No. 2.

In taking the photograph referred to as defendant's Exhibit No. 3, my camera was 200 feet north of the crossing between the north-bound and south-bound tracks, looking in a southerly direction.

Counsel for defendant thereupon offered in evidence the photograph so identified by the witness, which photograph is submitted herewith and made part of this record, marked Defendant's Exhibit No. 3.

In taking the photograph referred to as defendant's Exhibit No. 4, my camera was located 300 feet south of the crossing in the center of the north-bound track and south-bound track, facing north.

Counsel for defendant thereupon offered in evidence the photograph so identified by the witness, which photograph is submitted herewith and made part of this record, marked Defendant's Exhibit No. 4.

In taking the photograph referred to as Exhibit 5, my camera was located 15 feet west of the south-bound track facing the north.

Counsel for defendant offered in evidence the photograph so identified by the witness, which photograph

Howard A. Murray.

is submitted herewith and made part of this record, marked Defendant's Exhibit No. 5.

In taking the photograph referred to as defendant's Exhibit No. 6, my camera was located 24 feet west of the south-bound main track facing north.

Counsel for defendant thereupon offered in evidence the photograph so identified by the witness, which photograph is submitted herewith and made part of this record, marked Defendans's Exhibit No. 6.

Cross-Examination.

By Mr. Brumbaugh:

In taking the photograph referred to as defendant's Exhibit 1 which you are exhibiting to me, was taken with my camera located 51 feet west of the south-bound main track facing north, and the camera was west of the right of way in the center of the roadway which runs eastwardly and westwardly across the track, pointing over to the right of way of the railroad right up the track through the poles covering about 75 degrees. We just photographed up that way; I do not know what we were focusing on, but I made the pictures in the direction I was told to make them, the camera being in the center of the roadway and the lens facing north.

In taking picture No. 2, I went 90 feet east of the railroad crossing and the camera was facing west, that picture showing the condition of the roadway and the general contour of the place from the east side of the track.

In taking picture No. 3, the notations on the back would indicate that I was 200 feet north of the crossing and facing south, my camera being in between the tracks, with a straight view south, the camera taking in about what you see with your eye, and approximately 75 feet or 75 degrees. The picture shows the section house, but I could not state the distance to that house. If this section-house was at my back, it would not have been in the picture. If that section-house was more than 200 feet north, then my picture isn't correct or my notations on the back are incorrect.

I was 300 feet south facing the track north when I took the picture referred to as Exhibit 4, with my camera in the center of the two main tracks, so that I had a straight view right down the right of way at that time.

In taking picture No. 5, I was in the center of the roadway which crosses the track, this road is supposed to be east and west and my lens was parallel with that,

Guy Fayne.

and the picture was taken in a northerly direction.

In taking all of the pictures, the camera was nearly parallel with the roadway that crosses the railroad. My camera was not parallel with the railroad, but at an angle of the tracks. You can see the angle there, showing if it was parallel with the track, the track would have a vanishing point right in the center of the picture. We were back just about the way a person would be looking up the track standing fifteen feet away. That would be about the view that you have, in this picture No. 5.

In taking picture No. 6, I was in the center of the roadway with my camera and 24 feet west of the southbound main track facing north. The section-house shown therein is the same section-house shown in "Exhibit 3" and in which the notation showed the section-house was within 200 feet of the center of the crossing.

Thereupon Howard A. Murray retired from the witness stand and

Guy Fayne,

called as a witness on behalf of defendant, having been first duly sworn, testified as follows:

Examined by Mr. Marshall:

My name is Guy Fayne. I have lived at Glendale, Ohio, for about fourteen years. I am employed as passenger brakeman on the Baltimore and Ohio Railroad Company and have been on that railroad and the old C. H. & D. twenty-one years.

On November 6, 1923, I was head brakeman on train 55 and located in the smoking or combination car which was the head car of the train. As the train approached Whitfield crossing that day the usual crossing signal, consisting of two long and two short blasts of the whistle, was given. I also heard the air and whistle go on at the same time. The train stopped about two or three train lengths below the crossing. When it stopped I got out and saw that the steps on the combination car and coach were damaged and the coupling of the combination car and ladies' car, the first two cars of the train had parted and was being held by safety chains which are on each and all of the cars. This did not have any effect on air because the air signals were still coupled together. I went to the head end of the engine and saw that the buffer or part of head frame of the engine had been hit; also one of the air pipes broken between the engine and tender, which caused the automatic signal to leak, and we had to

Robert E. Gray.

fix that before I could couple the train up again. After fixing this, I coupled the train up. In examining the engine I noticed that the cow catcher or pilot was not damaged in any way, but there was a mark on the iron bumper, or what we call the buffer of the engine. The cow catcher is attached to this buffer which is up against the engine, the cow catcher being in front of this buffer but attached to it.

The first crossing signal was given somewhere between the bridge and Whitfield crossing. The distance, I cannot say, but approximately half a mile. The second signal that I heard was the long shrieky whistle which was louder the further we went.

William Morgan was the conductor of my train.

Cross-Examination.

By Mr. Brumbaugh:

I was the head brakeman on this train and was in the combination smoking and baggage car which is the first car back of the tender. I recall the giving of the usual crossing signal somewhere between the bridge and Whitfield crossing. I also heard one other signal, this being the screechy loud whistle, just about the same time the air went on. I don't know exactly how far we were away from the Whitfield crossing when the regular crossing whistle of two long blasts and two short was given, but I know the instinct of railroading. When I hear a whistle I know we are approaching a crossing. The next signal I heard started to sound about the same time the air went on. It was immediately after the crossing whistle was sounded, as I recall a very few seconds after that until this other whistle. I felt the air and heard the shrieky whistle; our train was running about 55 to 60 miles an hour, I would judge.

Thereupon Guy Fayne retired from the witness stand and

Robert E. Gray,

called as a witness on behalf of defendant, having been first duly sworn, testified as follows:

Examined by Mr. Marshall:

My name is Robert E. Gray. I am a civil engineer and live at Dayton, Ohio. I graduated from the University of Dayton in the Civil Engineering Department in 1912. Since that time I have been employed by the National Cash Register in the electrical engineering department immediately after leaving school; by the city of Dayton as assistant engineer from 1914 to 1918; I was in the United States army in the construction di-

vision of the Quartermaster's Corps from 1918 to 1920; since 1920 I have been employed by the Fink Engineering Company, Dayton, Ohio. I now hold a commission as first lieutenant in the United States Army Reserves.

At your request I made a plat and observations as to the conditions at Whitfield crossing south of Dayton, where I was informed an accident ocurred on November 6, 1923, making this plat December 10, 1924. It is a correct representation of the right of way of The Baltimore and Ohio Railroad Company at that point. The measurements were made on the ground so as to show the right of way and surrounding conditions. The observations were made on Tuesday and Wednesday of this week just prior to this trial.

Thereupon, after the court had duly cautioned the jury, an adjournment was taken until 9:30 o'clock in the morning of the following day, Friday, December 12, 1924, at which time counsel for both parties being present, Robert E. Gray resumed the witness stand and testified further, as follows:

Examined by Mr. Marshall:

The blue print just handed me, designated as defendant's "Exhibit 7," is made to scale and is a correct plat of the crossing as I found it at that time. The actual measurements were made on the ground, with a standard steel tape, by myself and assistants, Norman G. Jacks and Matthew O. Boyle. While there, we made observations and measurements as to where and at what points a view could be had of the track leading north of the Whitfield crossing. I first made an observation of this standing on the center line of the west bound track and then at five-foot intervals, going westwardly from the center line of that track. I first laid off the ground in five-foot intervals from the center line of the west bound track and then starting from the center line of the Farmersville and West Carrollton Road I laid off the west track and then starting from the center line of the Farmersville and West Carrollton Road I laid off the west track of the railroad in 100-foot stakes, going clear up to the point of curve of the railroad, which is north of the crossing. I was assisted in these observations by Norman Jacks, he standing on the center line of the railroad and I on the point of observation. When Norman Jacks came into my view, standing on the center line of the track, he put in a red and white pole, what we call a range pole, and then with a steel tape he measured from the

nearest 100-foot station to the point where the pole stood and recorded it. As the stations progressed northwardly, the first station was called station 1; that was 100 feet; the second station was called station 2, 200 feet. Supposing that he stood beyond station 4 a certain distance, he would stick the rod in at that point and would measure by putting a pin in at the station to hold the free end of the tape, and he would measure from that station to where the rod stood and record it. After each observation he would come back and I would check that distance and enter it in my field-book. By the expression "possible view of track," appearing in the field-book, I mean the view that a man standing at stated points measured from the center line of the track could plainly see a man with a rod standing on the center line of the railroad track.

My assistant, Norman Jacks, had such rod and was located at the center of the west track of the railroad on what is known as the southbound track. I was standing approximately on the center line of the highway. The traveled roadway of this highway is 18 feet wide. The planked crossing of the railroad is 15 feet wide, and between fences west of the crossing the distance is 49.2 feet from the fence line to fence line of the road. The railroad right of way north of the crossing is 65.5 feet between fence lines. From the west fence to the gauge line is 24 feet. The south end of the toolhouse located north of the crossing and west of the southbound track is 243 feet from the center line of the highway. From the east side of the toolhouse to the west rail of the southbound track is 15 feet. This tool house is 8.7 feet north and south. It is eight feet high at the eaves and eight feet and six inches at the peak. The roof is lower at each side and runs to a peak at the center. The west line of the tool house is on the west fence line of the railroad right of way.

My observations as to opportunity of one approaching from the west to see plainly north along the tracks were made measuring from the center line of the west track, which is customary. Standing five feet west of that center line, I would be two feet eight inches west of the west rail and I could see to the point of curve which is 4527 feet north of the Whitfield crossing. When 10 feet from the center line of the southbound track, I would be seven or eight inches from the west rail and could see the same point of curve 4527 feet north of Whitfield crossing. When 15 feet from the

center line of this southbound track, I could still see the same point of curve of the railroad track. I was then twelve feet eight inches from the west rail of the southbound track and very close to being on the line with the east side of the tool-house. When twenty feet from the center line of the southbound track, I could see north 1600 feet, which was just a short distance past the whistling post. By stepping back 18 feet from the center line of the track, it was possible to see the whistling post itself, which was 6 feet west of the west rail. The whistling post is 1560 feet north of the center line of the crossing. When 20 feet from the center line of this southbound track, I was 17 feet 8 inches from the west rail of this track. When 25 feet from the center line of this southbound track, I could see north along the track 800 feet and would be located 22 feet 8 inches from the west rail of this southbound track. When 30 feet west of the center line of the southbound track, I could see north along this track 600 feet and would then be 27 feet and 8 inches from the west rail of the southbound track. At 33 feet 6 inches from the center line of the west track the southeast corner of that little store and the southeast corner of the tool-house came on line. The vision up to that point had been obstructed only by the tool-house, but at 33 feet 6 inches the southeast corner of both of these buildings came on line, and at that point I could see 500 feet up the track. Observing from this 33 feet 6 inches, I was 31 feet 2 inches from the west rail of the south-bound track.

That little grocery is 12.3 feet east and west and 14.2 feet north and south. The south end is six-tenths of a foot west of the west line of the railroad company and on the north end is nine-tenths of a foot west of the west fence line of the railroad company. It is 9 feet at the eaves and 12 feet at the peak of the roof.

My next observation was about 40 feet from the center line of the west track, which would place me 37 feet and 8 inches from this west rail. At that point I could see 204 feet of track and practically all the rest of the track was obscured by trees and the tool-house at that point.

The next observation was made 50 feet west of the center line of the west track and at that point you could see the track up to 158 feet north of the crossing and then you could see that part of the track which was between 800 feet to 1100 feet north of the crossing.

Robert E. Gray.

The limits there on that last observation, 800 to 1100 feet, were the northwest corner of the store and the trees in Doyle's yard. All of these observations were made by me standing in the center of the highway. The center line of that traveled roadway running north past Mr. Doyle's place was 32.9 feet distant from the center line of the west track, so at that point the observation being taken at 50 feet, I was 17.1 feet west of the center line of that Infirmary road, which runs north past the places of Rice and Doyle.

The south-bound track of the Baltimore and Ohio Railroad Company is 4 feet 8½ inches between gauge lines, that is, between the inside lines of each rail.

In making all of these observations, my assistant, Norman Jacks, was located up the tracks and I observed him at those distances. On none of these observations up to 60 feet did the Rice property or anything on the Rice property interfere in any way.

The south line of the Doyle property is 176.6 feet north of the center line of the Farmersville and West Carrollton road.

The south line of the store strikes the center line of the Infirmary Road at 70.8 feet west of the center line of the Farmersville and West Carrollton Road. The distance between these two points is 105.8 feet.

This plat made by me shows all observations between those lines that there were in the way of trees and buildings or anything else. This map and figures on the map and everything set out thereon were made under my supervision and are correct.

Defendant thereupon offered the plat in evidence.

Cross-Examination.

By Mr. Brumbaugh:

The observation on distances made by me were started Tuesday afternoon and completed Wednesday morning of this week. The measurements of the buildings was started on Monday of this week and observations continued until Wednesday morning of this week, when they were completed. I made no observations in November, 1923. The plat is correct and complete so far as buildings and observations to view are concerned between the Infirmary road and the right of way of the Baltimore and Ohio Railroad Company. The grape-arbors and grape vines on the Doyle premises are not shown as they were below the level of the house, and the house would form the major obstruction in that case. From memory, I would say these grape-arbors were 8 feet high. The section-house is 8 feet at the

Robert E. Gray.

eaves and 8 feet 6 inches at the peak. I made my observations from a point on the West Carrollton and Farmersville road looking to the right of way down through whatever openings or things there were up to the section-house and tracks.

Right close to the west line of the right of way of the railroad company the plat shows a tree 18 inches in diameter. This tree is 25 feet high, and is an orchard tree. It is represented on this plat in the customary way by a round mark. From a point 50 feet from the center line, my observations do not show that the limbs of this orchard tree were any obstruction. One branch of this tree comes out on the right of way at a height of possibly 6 feet above the section-house.

I made my observation by eye and was standing still when making these, and looked carefully and intently to see what I could see. I measured the distance of the section-house from the crossing, from the intersection of the center line of the Farmersville and West Carrollton Road and the gauge line of the west rail of the west track. That would be the center line of the 15 foot plank roadway. In using that crossing, a person has 15 feet of the crossing to travel over. My measurements coincided with the center line of the traveled highway, and from there up to this section-house the south side of the section-house is 243 feet.

(After a conference of court and counsel at the bench, the plat was admitted into evidence.

Redirect Examination.

By Mr. Marshall:

I am in no way connected with The Baltimore and Ohio Railroad Company and have never been. The elevation of this grape-arbor is considerably below the elevation of the top of the tool-house and, in my judgment, is not more than a foot and a half higher than the top rail of the west track, because the Doyle yard is at least four feet lower than the edge of the railroad company's right of way at that point. The fence post along this Doyle property was just about the height of the railroad company's crossing at that point and you jump down in the Doyle yard. This right of way fence is a wire fence, with wooden posts, and about four feet high.

Taking the top of the rail on the center line of the Farmersville and West Carrollton road as elevation 100, at a point 10 feet west of the west rail, the elevation of the roadway is 99.7, or three-tenths of a foot lower than the top of the rail of the west track. At

Norman G. Jacks.

20 feet the elevation is 98.8, or 1.2 feet below the top of the rail. At 30 feet west of the west rail, the elevation is 98.2, which would make it 1.8 feet below the top of the rail. At 40 feet, the elevation is 97.7, which would make it 2.3 feet below the top of the rail. At 50 feet, the elevation of the roadway is 97.4 which would make it 2.6 feet below the top of the rail; 100 feet west of the west rail, the elevation of the roadway is 96.6 feet, which would make it 3.4 below the top of the rail. In the 100 feet leading from the west along this Farmersville and West Carrollton Roard there is a rise of 3.4 feet.

Thereupon Robert E. Gray retired from the witness stand and

Norman G. Jacks,

called as a witness on behalf of defendant, having been first duly sworn, testified as follows:

Examined by Mr. Marshall:

My name is Norman G. Jacks. I have lived at Dayton, Ohio, about eight years, and work for the Fink Engineering Company. The early part of this week, I assisted Engineer Robert E. Gray on the observations and measurements made by him at Whitfield. These measurements and observations were made December 8, 1924. These measurements were first made starting from the center line along the southbound track, measuring at five foot intervals, and then along the track in a northerly direction. From the center line of the road measurements were made at 100 foot intervals and then Mr. Gray would stand on these five foot intervals of the road and I would walk down the track in a northerly direction, and when I would come in his sight I would stop and make a measurement of that distance along the track. He would tell me to stop and I could also see him. I am six feet tall. I assisted him at all the measurements, and we used a standard steel tape.

Cross-Examination.

By Mr. Brumbaugh:

I had a painted red and white rod. I would set this rod at certain intervals and would look towards Mr. Gray and he would look towards me and motion to me as to whether or not he could see me. I would then change my station and move to some other point. All of these distances were noted. We had measured off these distances before.

Thereupon Norman G. Jacks retired from the witness stand.

Thereupon by agreement and under statement made

by counsel for plaintiff, a photograph was offered in evidence and made a part of the record marked "Plaintiff's Exhibit A," with a further statement that the distance from the west rail to place where camera was stationed in the center of the Farmersville-West Carrollton Road was 23.6 feet west from the west rail, the measurement being taken at right angles from the west rail.

The foregoing is all the evidence in the ease and constitutes the testimony and statement of all the evidence introduced and offered upon the trial of the case.

Thereupon came the defendant immediately at the close of all the evidence offered and introduced in the case and after both plaintiff and defendant had rested and renewed the motion which he had made at the close of the plaintiff's evidence in chief for a directed verdict for the defendant, for the reasons set out in said motion, to wit: That plaintiff has failed in its proof to introduce evidence proving or tending to prove the negligence of the defendant, and (2) that the evidence of the plaintiff shows as a matter of law that plaintiff's decedent was guilty of contributory negligence directly contributing to the accident and his resulting death; which motion is overruled by the court; and thereupon defendant noted exceptions to the ruling of the court in overruling said motion to direct a verdict.

Thereupon counsel for defendant presented to the court a request that the following special charges be given:

I.

The duty of an automobile driver approaching railroad tracks, where there is a restricted vision, to stop, look and listen, and to do so at a time and place where stopping, where looking and where listening will be effective, is a positive duty.

II.

Because of the fact that a collision between a railroad train and an automobile endangers not only those in the automobile, but also those on board the train, and also because the automobile is more readily controlled than a horse vehicle, and can be left by the driver, if necessary, the law expects from him a strict performance of the duty to stop, look and listen before driving upon a railroad crossing where the view is obstructed, and to do so at a time and place where stopping, and looking and listening will be effective.

Defendant's Special Requests.

III.

As a railroad company has no control over the trees, weeds, brush, shrubbery and the like, not on its right of way, it is not required to take such things into consideration when approaching a crossing.

IV.

As between a person about to cross over a railroad at a crossing and a train of cars approaching such crossing, the train has the right of way. This is so because the person can stop within a few feet, and the train cannot.

V.

If you find from the evidence that plaintiff's decedent and defendant were both negligent and that the negligence of both directly contributed to cause the accident complained of in plaintiff's petition, then your verdict must be for defendant.

VI.

There being no statute regulating the rate of speed of railroad trains, the defendant had the right to run its train, at the time and place of this collision, at any speed consistent with the safety which was necessary in the conduct of its business in the usual and ordinary manner.

VII.

Negligence in a railroad company in not giving signals or in omitting precautions or any kind, will not excuse a person approaching and about to cross a railroad track in his omission to be diligent in the use of his senses and to look and listen as a means of avoiding danger, and his omission to do so is concurring negligence which will prevent a recovery on account of his death.

VIII.

If you find from the evidence in this case that plaintiff's decedent by looking, listening, and stopping before going on the railroad track could have seen or heard the train coming from the north and avoided the accident, your verdict must be for the defendant, even though you further find the defendant failed to whistle, ring the bell or was otherwise negligent.

Thereupon counsel proceeded with their arguments to the court and jury, at the conclusion of which, after the court had duly cautioned the jury, a recess was taken until 1:45 in the afternoon of the same day, at which time, counsel being present and the jury being in the box, the trial proceeded as follows:

CHARGE TO THE JURY.

(December 12, 1924.)

Gentlemen of the Jury: It now becomes my duty to charge you with reference to the issues of fact which are raised in the case you have just heard. I say the issues of fact because, of course, you realize that you are the sole arbiters of all questions of fact which may arise in a trial before you. These questions are distinguished from questions of law, and as to the law it is your duty to receive the law from me as I give it to you, and apply that to the facts as you may find them to be, and thus arrive at the ultimate determination of whether your verdict in this case shall be for the plaintiff or for the defendant. This, in a sense, is a judicial act upon you part; it is to be performed by you upon careful analysis of the evidence and with that freedom from all bias or prejudice, fear or favor, which the courts attempt to exercise in the performance of their duties. You are to consider the evidence which has been produced before you; you are to analyze that, and you are to found your verdict upon that. You are to do this by the exercise of judgment, discretion, powers of analysis, and with entire freedom from all matters of sentiment or of prejudice, if any exists in the minds of any one of you.

This case is brought under Section 10770 of the General Code of Ohio, commonly known as the "wrongful death" statute. By this it is provided that:

"When the death of a person is caused by wrongful act, neglect or default such as would have entitled the party injured to maintain an action and recover damages in respect thereof, if death had not ensued the corporation which * * * would have been liable if death had not ensued * * * shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it in law murder in the first or second degree, or manslaughter."

The following section provides that such action shall be for the exclusive benefit of the wife, or husband, and children; it must be brought in the name of the personal representative of the deceased person, and the sum recovered shall be the pecuniary damages to such wife or next of kin by reason of the decease of the party injured.

While such action is brought solely for the pecuniary injury sustained, it is, as you may have noted by my reading of that portion of the statute, conditioned upon

the fact that the decedent might have maintained an action for the recovery of damages due to himself had death not ensued. The action is therefore primarily one of negligence, that is, it is to be determined by you, and the first issue to be considered by you is the same as if death had not ensued and this decedent, Nathan Goodman, had appeared before you in this case for the purpose of asserting an action for recovery of damages for injury to himself.

By the plaintiff's petition it is alleged that the death was caused and the injury inflicted as the direct and proximate result of negligence upon the part of the railroad company in failing to give proper signals of the approach of the train to this crossing, and in failing to operate the train with regard to speed and signals of approach, as reasonably prudent persons would have operated it in view of all the surrounding circumstances of the case. To this petition defendant has answered, denying negligence upon its part and asserting that even though found negligent upon its part still the plaintiff cannot recover because the decedent was himself guilty of negligence which directly contributed to produce or bring about his injury. These pleadings constitute the issues in the case, and, as you will see, the first issue is that of negligence; the second issue for your determination, if you come to it, is that of contributory negligence upon the part of the descedent, that is, negligence of the decedent which directly contributed to bring about his own injury.

Negligence may be defined as the failure to use that degree of care which the law prescribes under the particular circumstances of the case involved. It is sometimes said to be the doing of that which ought not to have been done, or the not doing of that which should have been done, according as you view it as negligence of commission or negligence of omission; but in the last analysis, and whether we consider it from the viewpoint of the plaintiff or the defendant, negligence is always a breach of the duty imposed upon the individual charged to use care under the circumstances of the particular case.

The first question, therefore, for your consideration is that of the degree of care which was imposed upon plaintiff and defendant with respect to crossing of the tracks in the one instance, and the operation of trains over those tracks in the other. In respect to both plaintiff and defendant the degree of care imposed is reasonable care, that is, such care as reasonably pru-

dent persons would exercise under all the surrounding circumstances of the case; and as to the defendant this has become crystallized as regards several of its elements. The duty of care imposed upon the defendant in the operation of its trains is still reasonable care, that is, such care as reasonably prudent operators of trains would use under the same surrounding circumstances as this instance; but because of the size and weight of locomotives, because of the speed of travel demanded by the public, because of the very nature of the means employed, several of the elements of care have become crystallized into more or less fixed rules. In other words, there is an obligation upon the railroad company in the operation of its trains to keep a lookout ahead to see that other trains or obstacles or other users of the territory, travelers upon the road, are not upon the track, and to enable the company, if possible upon discovering someone upon the track, to stop their trains. It is the duty of the railroad company to give signals of approach to crossings. This duty has been expressed in statutory enactment in Ohio in Section 8853 of the General Code, which provides:

"Every company shall attach to each locomotive engine passing upon its road, a bell of the ordinary size in use on such engines, and a steam whistle. When an engine in motion and approaching a turnpike, highway or town road crossing or private crossing where the view of such crossing is obstructed by embankment, trees, curve or other obstruction to view, upon the same line therewith, and in like manner where the road crosses any other traveled place, by bridge or otherwise, the engineer or person in charge thereof, shall sound such whistle at a distance of at least eighty and not further than one hundred rods from such crossing, and ring such bell continuously until the engine passes the crossing".

This defines the duty of the railroad company as to crossing signals, a duty which is imposed by statute and which it is negligence, per se, to omit. Summarizing it, upon approaching a railroad crossing it is the duty of the engineer to sound the whistle not less than 80 rods—not nearer than 80 rods nor more than 100 rods from the crossing, and the whistle to be sounded is the same whistle which it is provided shall be attached to every locomotive. This distance is prescribed out of consideration of the speed at which railway trains are operated, out of consideration of the

fact that a railway train cannot deviate from the rails upon which it runs, out of consideration for the fact that it cannot be stopped in a short distance. It is thus prescribed that at not more than 1,650 feet from the crossing, nor less than thirteen hundred and some odd feet, which is 80 rods from the crossing, the crossing whistle shall be blown. It is also prescribed that the bell shall be rung until the crossing shall have been passed. This may be said to be the minimum requirement which is imposed upon the railway as to such signals. It is not the definition of their entire duty, for that duty is only achieved or performed by using such care under the particular circumstances of the case as reasonably prudent operators would use. There is no statutory requirement as to the speed of railroad trains; this is a matter which is left to the sound discretion of the operators of the roads. Speed ordinarily is not the basis of negligence unless such speed would not have been used by reasonably prudent persons under the circumstances of the particular case. And so it is with signals. To omit a signal required by statute is negligence, but the railway company is also bound to give such signals as would be given by reasonably prudent persons under the particular circumstances of the case, even though they be in addition to the signals prescribed by statute.

This will give you some idea as to the first issue to be determined by you, and that is the issue of whether or not the defendant company was negligent at the time and place of this accident in its operation of its train upon the railway. Did it approach this crossing at such speed as reasonably prudent persons would have used under those circumstances? Was the crossing such as to require a departure from the general rule that speed is not ordinarily the foundation of negligence? Was the view so obstructed of travelers upon the road as to require the railroad's anticipation of possible injurious results to travelers if the speed were not decreased? Was the signal given within the required distance of not less than 80 nor more than 100 rods, and was the bell rung upon the railway locomotive from the point of 80 rods until the crossing had been passed? These are the elements of negligence charged, and these are the matters for your first consideration.

In this connection I may add a word with reference to the probative effect or force of so-called positive and negative evidence. It is a matter of common ex-

perience that we may be within hearing and yet, if intent upon our personal affairs, may not hear; it is a matter of common experience that the affirmative statement of a man that he heard or he saw is of greater probative force than the statement of others that they did not hear or did not see. Affirmative evidence is to be given greater weight than negative, provided the witnesses giving the evidence are of equal credibility and you believe the testimony so given. That is illustrated in a homely way by simply saying that if men of equal credibility testify before you, and one says positively "I heard the whistle" and the other says "I did not hear it", and thus takes the position that while not testifying that it was not sounded or was not blown, the most that he can say was that he did not hear it, clearly the proponderance or greater weight of the evidence is in favor of the affirmative testimony.

If you find that the defendant company was not negligent in the operation of its trains, then you need go no further, but your verdict would be for the defendant. This action, as I have stated, is based upon negligence, and may be maintained only under such circumstances that the decedent, had not death ensued, might himself have sued for negligence. If the negligence on the part of the defendant is absent, clearly there can be no recovery.

We have considered the question of the duty imposed upon the defendant, the duty to use care. We will now consider the duty imposed upon the plaintiff. That duty was likewise the duty to use reasonable or ordinary care under the circumstances, such care as reasonably prudent persons would exercise under like circumstances; but just as in the case of the duty imposed upon the railroad company, so with reference to railroad companies, the duty imposed upon the traveler upon the highway has been crystallized in certain particulars. The railroad is a known source of danger. Upon approach to a known railway crossing the traveler is held to know that trains are operated upon that railroad, are operated at a high rate of speed, that they cannot be turned from the railroad, that they cannot be easily or quickly stopped, and therefore the law has imposed upon the traveler, as a minimum requirement of a reasonably prudent man, the duty of using his faculties of sight and hearing for his own protection. Upon approaching such railroad crossing it is his duty to look and listen for the approach of trains, and if need

be, in order to make such looking and listening effective, it is his duty to stop. In other words, the duty to look and listen implies a duty to look and listen at such times and places as will make looking and listening effective. The law does not require vain acts of one, and when the view is barred by obstructions it would be clearly futile to require the traveler at that point to look. But the greater the obstructions to the view, the greater the duty to look at other places where obstructions do not exist, to look at such places as will enable the traveler to see, and when he has done so, he is charged with seeing that which, if he looked, he must have seen. In other words, one cannot say that he looked and saw no locomotive where, if he had looked he must have seen the locomotive.

One word more in this connection, and that is that while the use of automobiles in travel upon the public roads may be said to have direct bearing upon the care to be exercised by the defendant, that is, in connection with the anticipation of such automobiles at crossings, yet the advent of this type of travel does not relieve the automobile driver of his duty to look and to listen, and if need be, to stop, nor his duty to look and listen at such times and places as will make looking and listening effective. The railway company has not the exclusive right to the use of crossings; because of the differences between trains and other types of vehicular traffic, which I have already pointed out, the railway is given the right of way over crossings, but it is given such right of way conditioned upon the giving of reasonable warning of its approach. The traveler likewise has a right upon the crossing and a right to use the road, but he also is bound by the duty to use care as I have defined this to you. If he heedlessly runs into danger, if without observing the duty which is imposed upon him by law he drives upon the crossing, and if his negligence directly contributes in any degree to bring about the injury which he sustains, he cannot recover from the railway company, notwithstanding such railway company may, upon its part, have been negligent.

Where the accident or injury occurs from the joint and concurrent negligence of both parties, then the law does not attempt to apportion the blame as between the parties; the plaintiff cannot recover. There is no doctrine of comparative negligence in force in Ohio. This, therefore, will be the second issue which you may have to consider, the first being the question of negligence upon the part of the defendant. If you find that the

defendant was negligent and that the negligence of the defendant directly and proximately caused injury to the plaintiff, then you will inquire into and determine whether the plaintiff, upon his part, or the plaintiff's decedent, upon his part, was guilty of negligence which directly and proximately contributed to bring about his own injury. This leads us to a definition to the jury of what we mean by direct or proximate cause.

I have said that if you find that the defendant was negligent and that its negligence directly and proximately caused injury to the plaintiff's decedent, and that if you find that plaintiff's decedent was not negligent, or that the negligence of the plaintiff's decedent did not directly and proximately contribute to produce his own injuries, then you may find for the plaintiff. In all of these definitions or charges I have used the expression "direct and proximate cause." The direct and proximate cause of an injury is that cause without which the accident would not have occurred and which did, in fact, in the natural course of events, bring about or produce the injury in question. Manifestly, an injury may have either a single proximate cause or it may have a plurality of such causes; it may be due to the sole negligence of the defendant, or it may be due to the sole negligence of the plaintiff, or it may be due to the combined and concurrent negligence of both plaintiff and defendant; and this is the issue which you are here to determine.

I have usually charged a jury that that cannot be considered as negligent from the doing or omission of which injurious results were not to be expected; not that the exact results which did occur must be anticipated, but it is quite clear that if reasonably prudent individuals would not, under all the surrounding circumstances of the case, anticipate generally injurious results to occur from the doing or omitting to do some act, then such act should not be considered as negligent. This is sometimes, and by many judges and by many courts, considered an element of proximate cause, although I have generally classified it with negligence. By these it is said that that is not the proximate cause of an accident from the doing of which a reasonably prudent person would not have anticipated injury to follow.

You will thus apply it to this case, and if you find that either in the matter of speed or in the matter of blowing the whistle, or in the matter of operation of its train at this crossing as regards speed, signals and

lookout, the defendant was negligent, omitted any of those elements which I have charged you would constitute negligence, you will then inquire into and determine whether such negligence was a proximate cause of injury to the decedent. Would the accident not have occurred but for the act of omission or commission? Was such act of omission or commission such as might reasonably lead an ordinarily prudent person to anticipate injurious results from the doing or omitting of the act? Did such act of omission or commission directly bring about or produce injury to the decedent? If you find that the defendant was guilty of negligence and that the defendant's negligence contributed directly to produce injury to the decedent, you will then inquire further into and determine whether the decedent upon his part was likewise guilty of negligence directly contributing to produce his own injury. Did he, in driving his automobile over and upon this crossing, use such care as reasonably prudent persons would have used under like circumstances? Keeping in mind that it is a positive duty upon his part, in approaching a known crossing, to look and listen for trains, did he, at this particular time, look to see whether trains were approaching? Did he listen? Were the circumstances such that the law would impose upon him, or that reasonable care would impose upon him a duty to stop, as well as to look and listen? Did he look at a point where looking would avail? Was he engrossed with his own affairs, or was he just taking a chance that no train would be passing? These are questions of fact for your determination. If you find that he was careless in any one of these respects, that he did thus violate the duty imposed upon him to use care, you will inquire into and determine whether such negligence was a direct and proximate cause of the injury, keeping in mind that an injury may have a number of proximate causes concurring and joining to bring about the injury itself. Possibly the simplest way to present to you this specific case is to say that the question is whether or not this decedent met his death through the sole negligence of the defendant railway company or whether such death was the direct result of negligence upon the part of both? In the first instance the plaintiff can recover; in the second instance the plaintiff cannot recover. For, if the decedent, as I have said, directly contributes to bring about his own injury, then the law does not attempt to apportion the blame, nor can the plaintiff recover, notwithstanding the negli-

gence upon the part of the defendant may have been greater than the negligence upon the part of the decedent; for if the negligence of both contributes, then there can be no recovery.

The burden is upon the plaintiff in this case to prove the negligence of the defendant. The burden is upon the defendant, before contributory negligence of the decedent can operate as a bar to recovery in a case in which recovery would otherwise be allowed, to prove such contributory negligence. This does not mean, of course, that the party having the burden of proof must offer a greater number of witnesses or a greater amount of testimony than the other party, but it does mean that when you go to your jury room and consider all the evidence introduced in the case, that introduced by the plaintiff and that introduced by the defendant, the evidence in favor of the contention of the party having the burden of proof must outweigh or preponderate over the evidence to the contrary before such party can be said to have sustained the burden which rests upon him.

This question of the weight of the evidence and of the credibility of the witnesses is for your determination and for your determination alone. In determining the credibility of witnesses it is proper for you to take into consideration the relationship of the witness to either of the parties in the case, if any; their attitude upon the stand as indicating a willingness to testify to the whole truth upon the one hand, or an inclination to color their testimony through sympathy or favor upon the other. You should take into consideration the position of the witness at the time in question; their intellectual capacity as indicating their ability to remember and their ability to narrate to you the facts as they occurred at the time. You may take into consideration the extent to which the testimony of any witnesses; and you may take into consideration the general probabilities as you deduce those probabilities from all the evidence in the case. And so you will, taking into consideration all the evidence, arrive at your determination of the issues as I have defined them to you. Was the decedent's death the result of sole negligence upon the part of the defendant, or was it the result of the

direct and concurrent negligence of both decedent and defendant? If you find that it was the result of sole negligence upon the part of the defendant, it will then be necessary for you to consider the question of the measure of damages.

In an action of this sort no sum may be allowed for pain or suffering to the decedent, nor for his personal injury; no sum may be allowed for the mental suffering, for the bereavement which his widow underwent by reason of his death. If you come to the consideration of this question you are to approach it with an earnest endeavor to determine what sum of money will fairly and reasonably compensate the plaintiff for the pecuniary injury done her by reason of the death of her husband and for the pecuniary injury alone. No sum of money can compensate one for the loss of another who is dear; no sum of money can bring back the life that is gone; and for that reason, in cases where recovery is allowed, it is allowed not as compensation for the loss of the dear one, not as compensation for the life, but purely as compensation for the pecuniary injury which has been suffered, such sum of money as will fairly and reasonably compensate Goodman's widow for the pecuniary injury which she has suffered by reason of his death.

Tersely summarizing what I have already said, if you find that Goodman's death is the direct and proximate result of negligence upon the part of the defendant, without negligence of the decedent contributing to produce his own injury, then you will find for the plaintiff. If you find that the defendant company was not negligent, or even though negligent you find that the decedent was himself guilty of negligence which directly contributed to produce his own injury, then you will find for the defendant.

If you find for the defendant you will strike from the verdict that clause which pertains to the assessment of damages; if you find for the plaintiff you will insert the amount of your verdict in one gross sum, both in words and figures, so as to avoid mistake. Whether you find for the defendant or for the plaintiff, you will do so only upon the concurrence of all of your

number, and those concurring in the verdict will place their names thereon, the foreman upon the face and the others upon the back of the verdict. But one form of verdict, the various exhibits and pleadings will go with you to the jury room.

Is there any omission, or are there any exceptions counsel wish to present to the court?

Mr. Brumbaugh: On the question of the statutory signal, as I understood your charge to the jury, you did not charge to the jury that if ordinary care of ordinarily prudent railroad operatives running the train, under the circumstances here, should require signals in addition to the statutory signal, the failure to give those signals in addition to the statutory signals could be considered by them as an act of negligence on the part of the company.

The Court: You mean the failure to give those non-statutory signals would be negligence?

Mr. Brumbaugh: If the circumstances required, it would be negligence.

The Court: I think I charged them almost in those words.

Mr. Brumbaugh: I paid particular attention to that, your Honor, and I thought otherwise.

The Court: The jury will understand that as regards both plaintiff and defendant the duty is to use that degree of care which ordinarily prudent persons would think should be used under the circumstances. This includes the duty to give statutory signals upon the part of the railway company as a minimum; if ordinary care requires the giving of additional signals, then that degree of care is imposed upon the railroad. It requires of the decedent the duty to use his senses for his own protection, to look and listen for approaching trains and if need be to stop, and to do this at a time when looking and listening will be effective. It requires this as a minimum. If care, ordinary care, requires stopping in addition to looking and listening, then that duty is imposed upon the decedent; in other words, the use of one's senses to ascertain whether a train is approaching, and the giving of statutory signals, are to be considered by you as absolute duties.

The extent of any additional action upon the part of either plaintiff or defendant, by way or warning, is to be determined by what care ordinarily prudent persons would use under those same surrounding circumstances.

Mr. Brumbaugh: Another suggestion I have to make, your Honor: If the jury should find that by reason of the negligence of the railroad company in having failed to perform the duty imposed upon it, under the facts and the charge that you have given, that the decedent was brought without fault on his part into a place of sudden danger and so close to the train that it was a sudden emergency, that then his duty as to care or action at that time would differ from that of a person who was not placed in a position of danger where they had to act suddenly upon the approach of imminent danger. In other words, the sudden emergency proposition in the case should be stated.

The Court: I intentionally omitted the sudden emergency proposition. If you wish me to charge upon it, I shall. Do you?

Mr. Brumbaugh: Yes, I request it, your Honor.

The Court: Gentlemen of the jury, when one is placed in a position of sudden danger, or confronted by a sudden danger, one is not held thereafter to the exercise of the same degree of care as one not confronted by such danger. In other words, in the emergency more latitude is given to the individual for the use of instant judgment; more latitude is given to snap judgment and the action under such dangerous emergency is not examined with the same degree of criticism, is not held to the same standard, as one acting calmly and in no emergency. But this principle does not apply except as to future action; it only applies where the individual is confronted with such emergency not by reason of his own negligence. This is illustrated in this case by the fact that this being a known crossing, and it being readily deducible from the evidence that the decedent was known in the neigborhood and knew this crossing himself, if he drove upon the track in the path, or almost in the path of the onrushing train, that might ex-

cuse him from negligence subsequent to the time he drove upon the track but would not excuse him from the duty of using his senses of sight and hearing before driving upon the track.

I cannot see that this doctrine, upon the evidence, has much application to the present case; my personal view of the evidence is that there was no act upon his part after the emergency which is claimed as negligence, particularly of his. The contention of the defendant is that the negligence consisted in not looking and not listening and not stopping to make looking and listening effective before the emergency arose, and that if he had done this, no such emergency would ever have been presented.

Mr. Marshall: Our judgment is, your Honor, that that is not the case, and we would like to note an exception to charging on the matter of sudden emergency. We feel that we could at least raise that question.

The Court: I don't get your point there. Did I misstate your contention?

Mr. Marshall: It seems to me that some part of the charge of that is calculated to confuse. That would be our objection to it. I am not sure it would not be true, but I feel that there is a question.

The Court: I don't think it will confuse the jury when I said I did not think it had much application to the case.

Mr. Marshall: Another question, you charged on the burden of contributory negligence, placing that upon the defendant. I note you did not bring up the other question, unless the evidence of the plaintiff raises that question. That is substantially, I mean, in other words, if the evidence of the plaintiff or plaintiff's decedent raised that question, then the burden would be upon the plaintiff to remove that presumption.

The Court: I realize that that is the usual way in which it is stated in the Ohio cases. I have avoided the necessity of dwelling upon the question of presumptions and removal of presumptions by telling the jury that they are to take into consideration all of the evidence in determining the burden of proof. If the evi-

dence, whether of the plaintiff or defendant, indicates contributory negligence, then the defendant has sustained the burden which rests upon the defendant. If the evidence of defendant or plaintiff indicates defendant's negligence, then the plaintiff has sustained the burden which rests upon him.

Mr. Marshall: There is one other question, your Honor, the use of the expression "compensates the widow for pecuniary injury suffered"—my understanding of the law has been that compensation in itself cannot be involved here. I appreciate the statute reads pecuniary injury, but it has been my understanding, at least, of the Ohio law that they specifically avoid the use of that expression. I refer to it as that is the way I understood your Honor in the charge as made. I may have misunderstood, but that is the way it impressed me at the time, that in that way there might be some question arise, because, your Honor, it is true, did say at another point that compensation would not and could not arise in this case from the very nature of it, but in connection with the words, as I got them, "compensate his widow for pecuniary injury suffered." Now, it isn't my understanding that the question of compensation can actually arise under the statute, and I raise that point.

The Court: Well, the jury understands, I think, that compensation means "make whole" as distinguished from any such elements as punishment or making an example of the defendant and as distinguished from punitive or exemplary damages, so-called, smart money. Nothing can compensate for the life, and therefore the law only gives you the right, if you find for the plaintiff, to award such sum as represents the pecuniary injury to the plaintiff.

Mr. Marshall: I called your Honor's attention to one matter, which, no doubt, your Honor is familiar with in the Kistler case, as to the matter of an obstruction outside of the right of way. I did not notice anything in the charge that specifically referred to that, and the lack of control, and so forth, and consequently the railroad company is not required to take into consideration—I am using substantially, if your Honor re-

members, the language in the Kistler case.

The Court: It happens that that is just the direct opposite of a case recently handed down by the Circuit Court of Appeals of the Sixth Circuit.

Mr. Marshall: I am referring to this Ohio case.

The Court: I am bound by the present Circuit Court of Appeals decision.

Mr. Marshall: And I would like to note an exception to that instruction—I might refer to it as to the statutory signals and the effect of any other signals under the circumstances prevailing in this case. I would like to note an exception.

The Court (to the jury): You may now retire, gentlemen, and commence your deliberations.

The jury thereupon retired to consider the verdict, and having returned into court, on December 12, 1924, a verdict for plaintiff in the sum of seven thousand dollars ($7000.00), the defendant afterwards on, to wit, the 15th day of December, A. D., 1924, moved the court to set aside the said verdict and grant it a new trial, said motion for new trial being as follows:

Now comes the defendant and moves the court to set aside the verdict rendered in favor of plaintiff and against defendant and for a new trial, for the following causes affecting materially the substantial rights of defendant, to wit:

1. That the verdict is not sustained by sufficient evidence and is contrary to the law of the case and the charge of the court.

2. Error of law occuring at the trial and excepted to by defendant.

3. Error of the court in failing and refusing to direct a verdict in favor of defendant and against plaintiff upon motion made by defendant immediately at the conclusion of the evidence offered by plaintiff and after plaintiff had rested, and also in failing and refusing to sustain said motion to direct a verdict in favor of defendant and against plaintiff renewed and made immediately at the conclusion of all the evidence offered in the case and after both plaintiff and defendant had rested; to which actions of the court and each of them defendant at the time excepted.

Charge to the Jury.

4. Error of the court in its general charge to the jury; to which action of the court defendant specially excepted.

5. Error of the court in failing to charge the jury as requested by defendant.

6. Error of the court in charging the jury as requested by plaintiff.

7. That the verdict is not sustained by the weight of the evidence.

8. Excessive damages appearing to have been given under the influence of passion and prejudice.

9. Newly discovered evidence material to the defendant which with reasonable diligence defendant could not have discovered and produced at the trial.

10. For other errors appearing on the records and proceedings in this case.

Which motion for new trial was, after argument by counsel for and against the motion, respectively, and after due consideration by the court, on the 2nd day of February, 1925, overruled and judgment rendered in favor of plaintiff and against defendant.

To which action of the court in overruling said motion for new trial and rendering judgment in favor of plaintiff and against defendant, defendant at the time excepted.

And now, in furtherance of justice and that right may be done the defendant, The Baltimore and Ohio Railroad Company, said defendant hereby tenders and presents the foregoing as its bill of exceptions in this case to the action of the court, and prays that the same may be settled and allowed and signed and sealed by the court and made a part of the record.

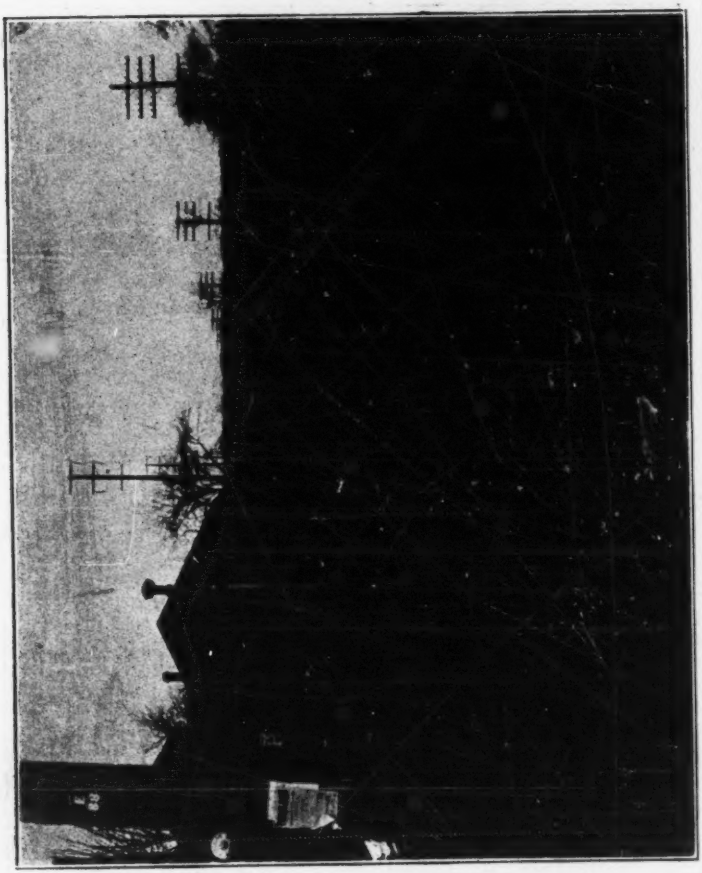
.....,

Counsel for Defendant, The Baltimore and Ohio Railroad Company.

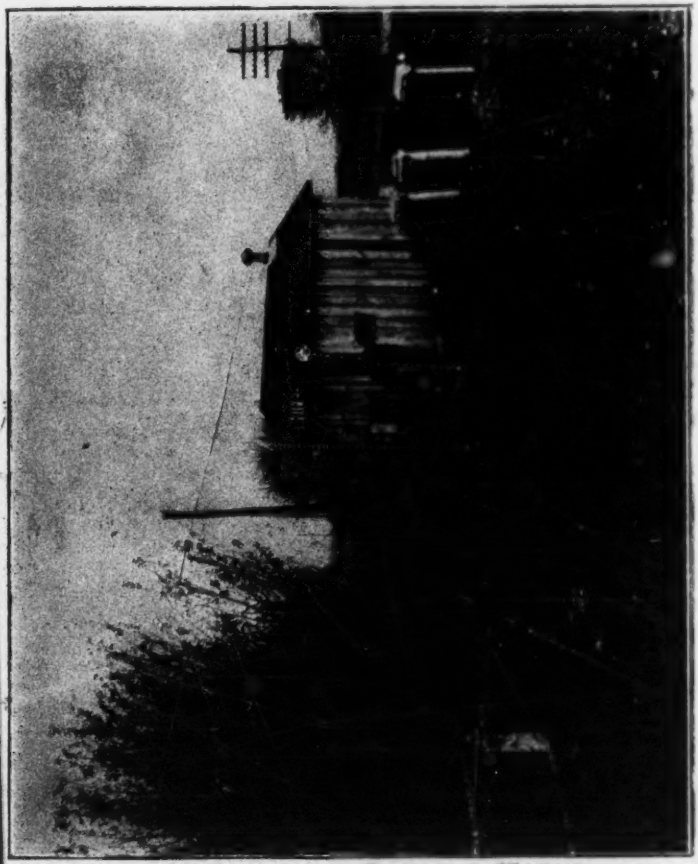
Settled and allowed this 11th day of May, A. D. 1925, in term.

Smith Hickenlooper,
Trial Judge.

PLAINTIFF'S EXHIBIT A.

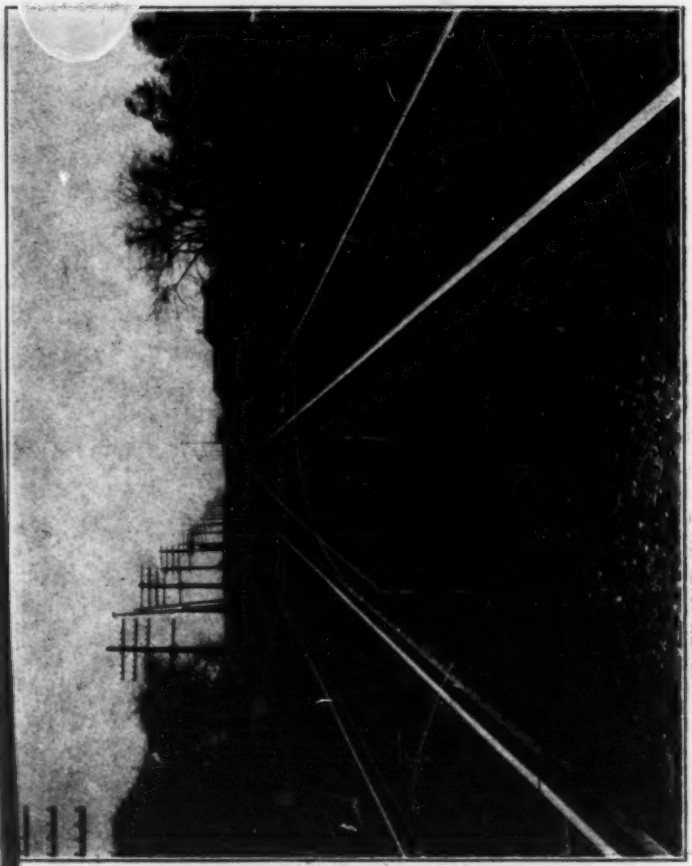


DEFENDANT'S EXHIBIT 1.



DEFENDANT'S EXHIBIT 2

DEFENDANT'S EXHIBIT 3.



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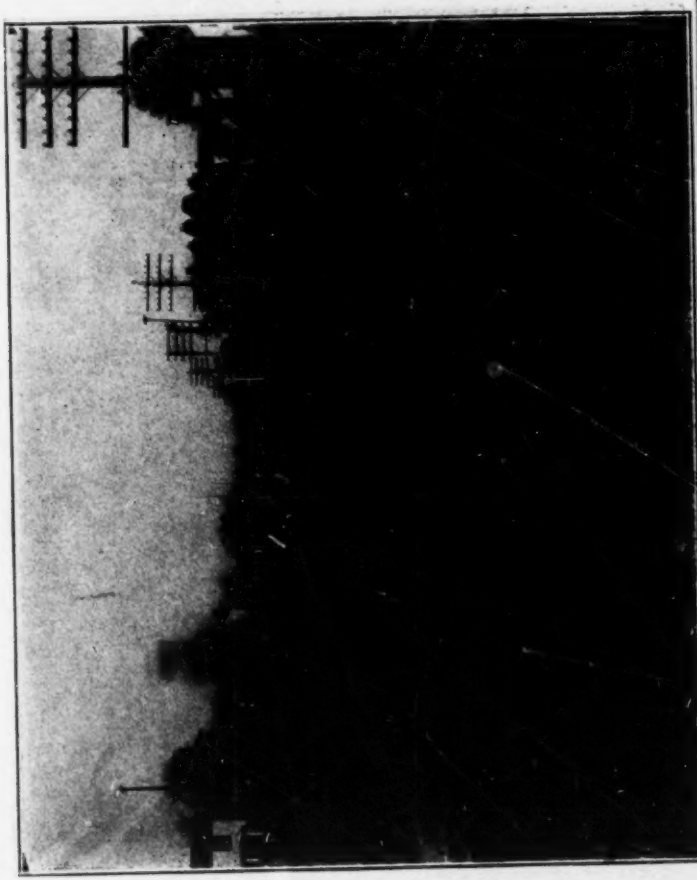

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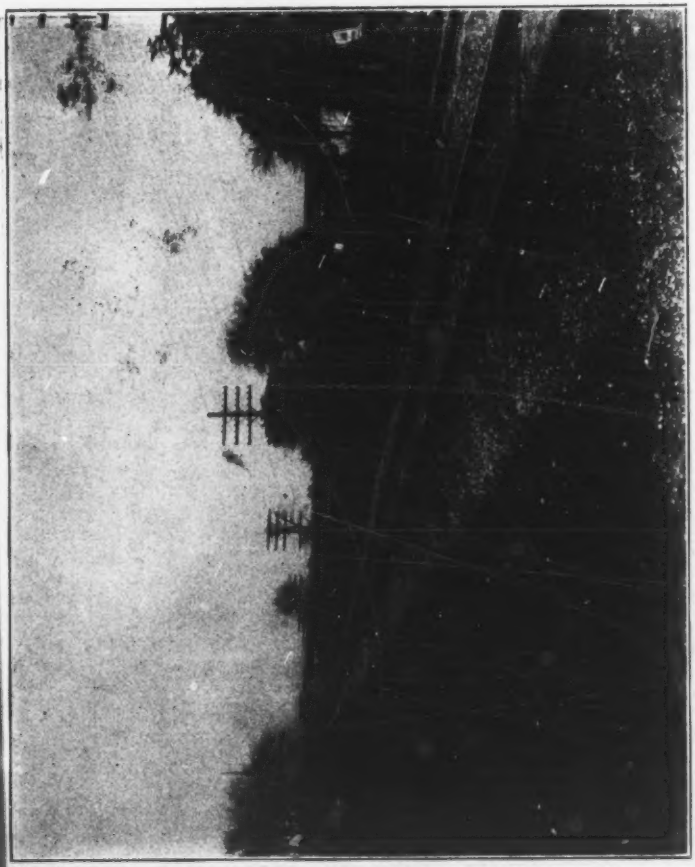

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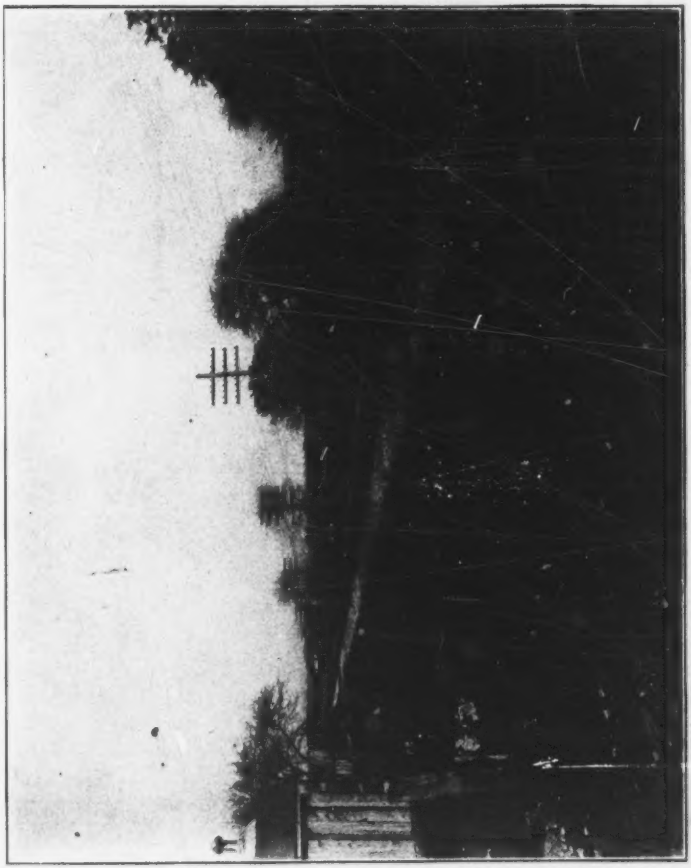
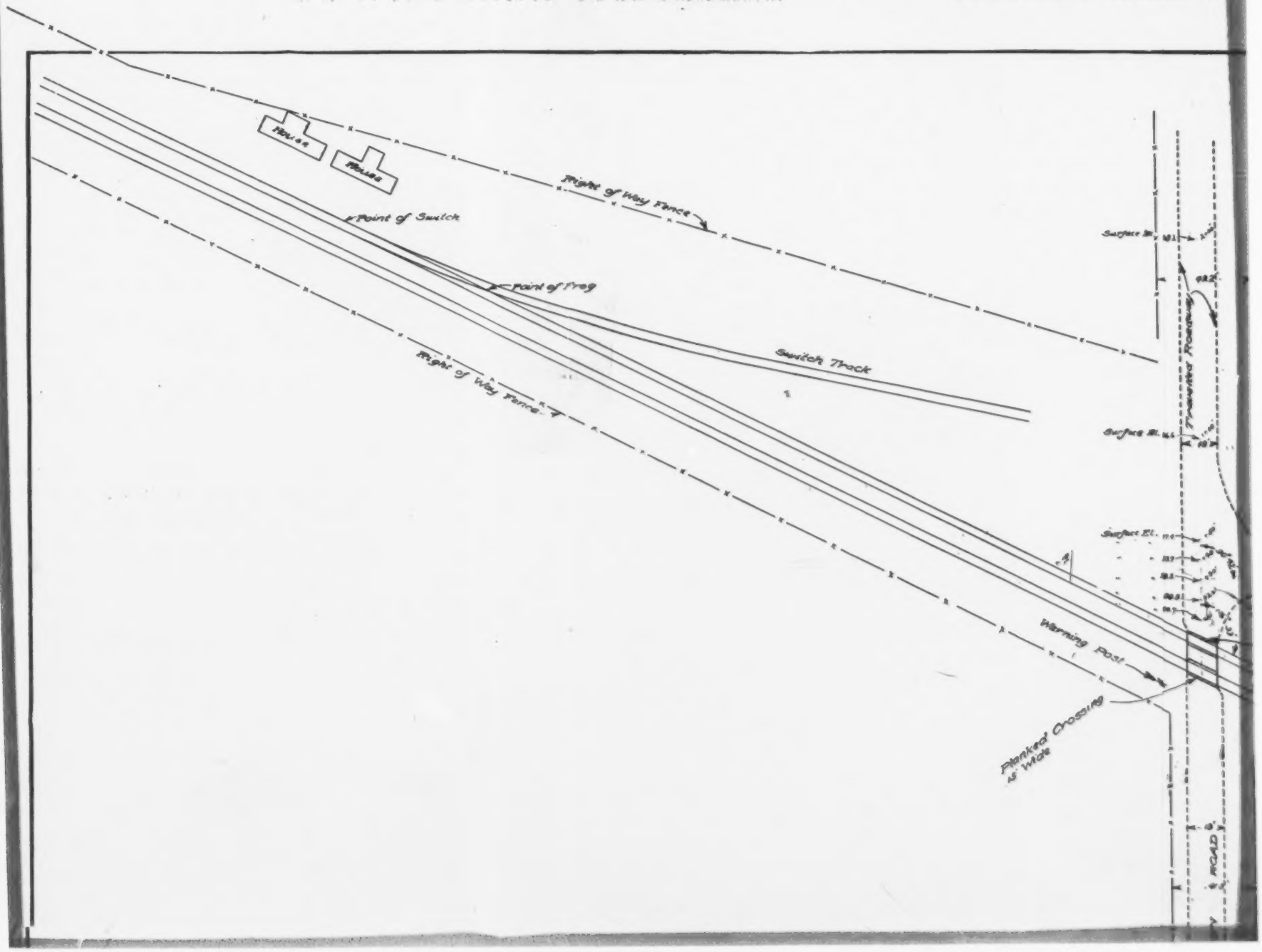
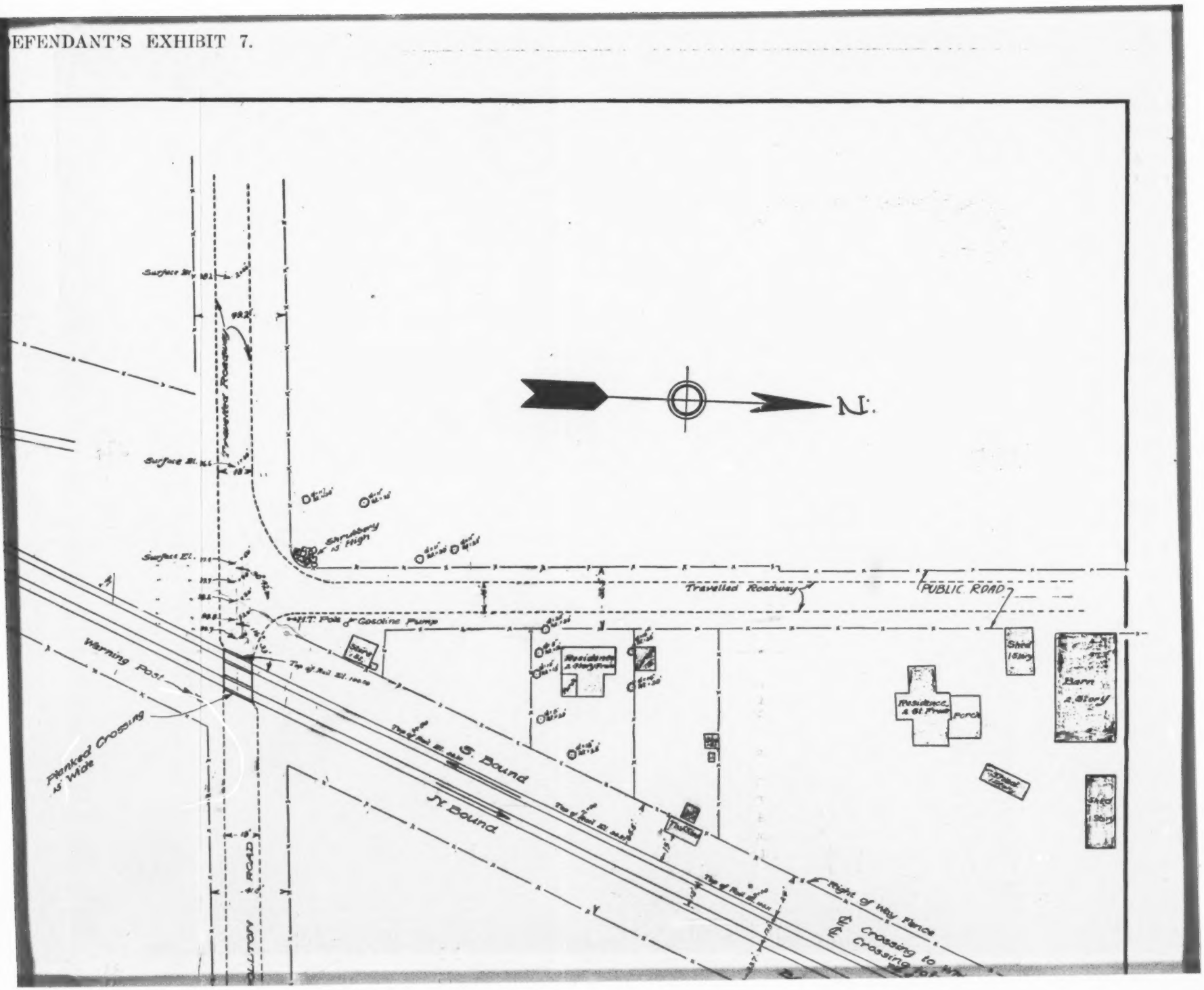
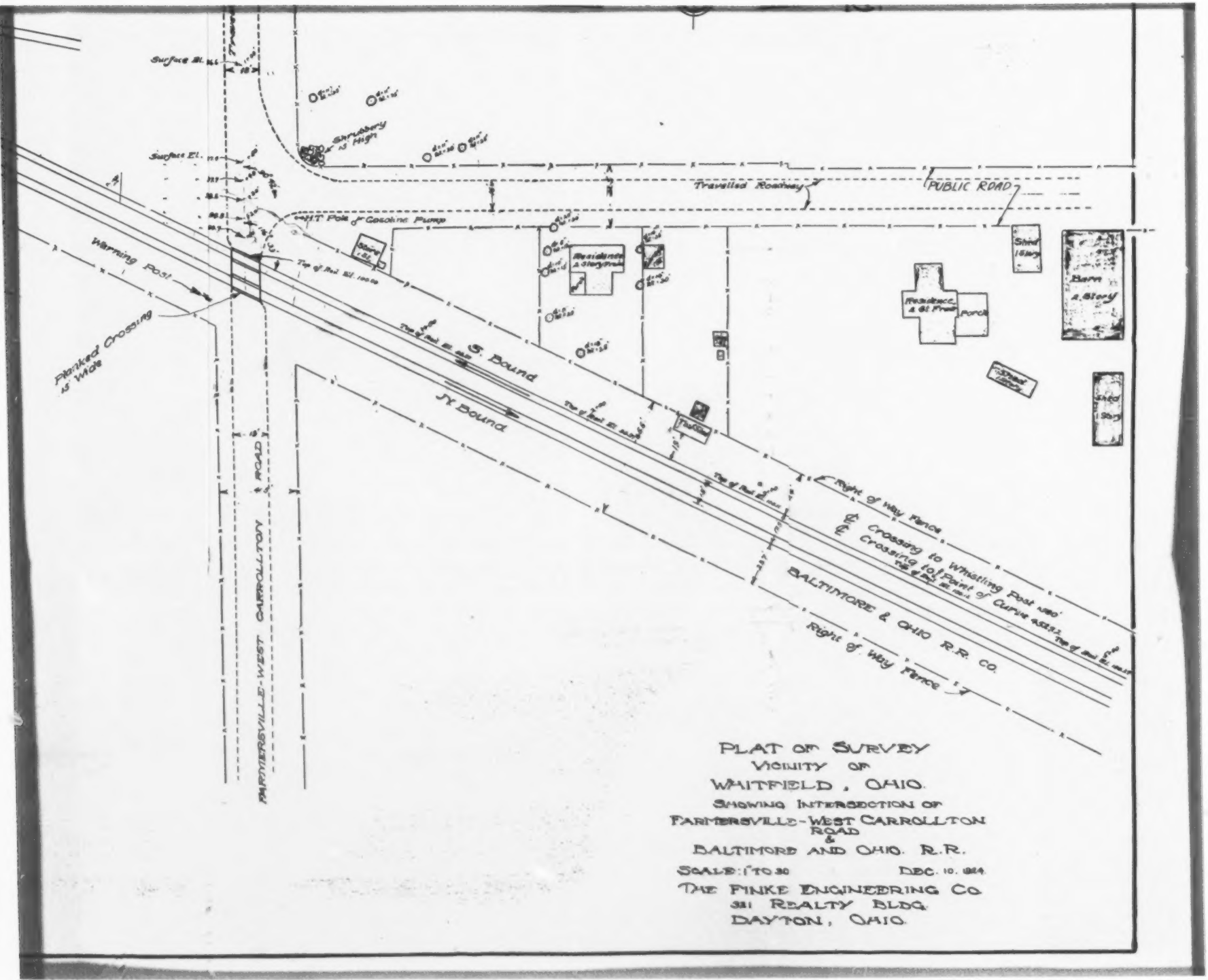


DEFENDANT'S EXHIBIT 7.



DEFENDANT'S EXHIBIT 7.





PLAT OF SURVEY
VICINITY OF
WHITFIELD, OHIO.
SHOWING INTERSECTION OF
FARMERSVILLE-WEST CARROLLTON ROAD
&
BALTIMORD AND OHIO. R.R.

SCALE: 1" TO 30' DEC. 10, 1924.

THE FINKE ENGINEERING CO.
321 REALTY BLDG.
DAYTON, OHIO.

Switch Track
Surface El.
Shrubbery 15 High
Surface El.
H.T. Pole & Gasoline Pump
Warning Post
Top of Rail El. 100.00
Residence & Shed
Planked Crossing 15' Wide
S. Bound
N. Bound
Top of Rail El. 99.88
Top of Rail El. 99.88
RIVERSVILLE-WEST CARROLLTON ROAD

PETITION FOR WRIT OF ERROR—Filed May 11, 1925.

To the Honorable Smith Hickenlooper, Judge of the United States District Court for the Southern District of Ohio, Western Division, Aforesaid:

Now comes The Baltimore and Ohio Railroad Company, defendant herein, by its attorneys, and respectfully shows that on the 12th day of December, 1924, the jury, duly impaneled, found a verdict against your petitioner and in favor of plaintiff, and upon said verdict a final judgment was entered by this court in favor of said plaintiff on the 2nd day of February, 1925, against your petitioner, the defendant herein, in which judgment and proceedings had prior thereto in this cause certain error were committed to the prejudice of this defendant, all of which will more fully in detail appear from the assignment of error which is filed with this petition.

Your petitioner feeling itself aggrieved by the said verdict and judgment entered thereon as aforesaid, herewith petitions the court for an order allowing it to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Sixth Circuit under the laws of the United States in such cases made and provided for the correction of errors so complained of and herewith assigned, and that a transcript of the records, proceedings and papers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals, and that an order be made fixing the amount of security to be given by your petitioner, the defendant herein, conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

Marshall & Harlan,

Attorneys for Defendant, Petitioner in Error.

ASSIGNMENT OF ERRORS—Filed May 11, 1925.

Now comes The Baltimore and Ohio Railroad Company, defendant, plaintiff in error in the above numbered and entitled cause, and in connection with its petition for writ of error in this cause assigns the following errors which plaintiff in error avers in the trial thereof and upon which it relies to reverse the judgment entered therein as appears of record:

First. That the court erred in overruling motion made by defendant immediately at the close of all the evidence offered and introduced by plaintiff on the trial of said cause and after plaintiff had rested, to direct a verdict in favor of said defendant for the reasons set out in said motion, to wit:

1. That the plaintiff has failed to produce any evidence proving or tending to prove any negligence on the part of defendant.

2. Because the contributory negligence of plaintiff appears as a matter of law.

To which action and ruling of the court in overruling said motion to direct a verdict for defendant, counsel for defendant at the time excepted.

Second. That the court erred in overruling the motion made by defendant immediately at the close of all the evidence offered and introduced in the case and after both plaintiff and defendant had rested, renewing the motion made at the close of plaintiff's evidence in chief for a directed verdict for defendant for the reasons set out in said motion, to wit:

1. The plaintiff has failed in its proof to introduce evidence proving or tending to prove the negligence of defendant.

2. That the evidence of the plaintiff shows, as a matter of law, that plaintiff's decedent was guilty of contributory negligence directly contributing to the accident and his resulting death.

To which action of the court in overruling said motion so renewed to direct a verdict for defendant, defendant at the time excepted.

Third. The court erred in making the charge to the jury and in failing and refusing to charge that the defendant railroad company was not required to take into consideration obstructions outside of its right of way, as set out in special charge 3, which was presented to the court prior to the argument, reading as follows:

"As a railroad company has no control over the trees, weeds, brush, shrubbery and the like, not on its right of way, it is not required to take such things into

consideration when approaching a crossing,"
and such failure to charge was specifically called to the attention of the court after the general charge of the court to the jury had been given, and the court refused to charge same.

To which action of the court defendant at the time excepted.

Fourth: That the court erred in making charge to the jury in using the following language:

"But the railway company is also bound to give such signals as would be given by reasonably prudent persons under the particular circumstances in the case, even though they be in addition to the signals prescribed by statute;" also,

"It is thus prescribed that at not more than 1650 feet from the crossing, nor less than 1300 and some odd feet, which is 80 rods from the crossing, the crossing whistle shall be blown. It is also prescribed that the bell shall be rung until the crossing shall have been passed. This may be said to be the minimum requirement which is imposed upon the railway as to such signals. It is not the definition of their entire duty, for that duty is only achieved or performed by using such care under the particular circumstances of the case as reasonably prudent operators would use."

To which action of the court in so charging, the defendant at the time excepted.

Fifth. That the court erred in entering udgment in favor of plaintiff and against this defendant.

Wherefore defendant prays that the judgment of the United States District Court be reversed and that said District Court be directed to grant a new trial of said cause.

Marshall & Harlan,
Attorneys for Defendant.

BOND—Filed May 11, 1925.

Know All Men by These Presents: That we, The Baltimore and Ohio Railroad Company, as principal, and The United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto Dora Goodman, as administratrix of the estate of Nathan Goodman deceased, plaintiff in the above entitled cause, in the full and just sum of $250.00 to be paid to the said plaintiff, Dora Goodman, as administratrix of the estate of Nathan Goodman, deceased, her attorneys, successors, executors, administrators or assigns, for which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Signed and Dated this the 11th day of May A. D. 1925.

Whereas lately at a regular term of the District Court of the United States for the Southern District of Ohio, sitting at Dayton, Ohio, in said district, in a suit pending in said court between Dora Goodman, as administratrix of the estate of Nathan Goodman, deceased, as plaintiff, and The Baltimore and Ohio Railroad Company, as defendant, cause No. 149, on the law docket of said court final judgment was rendered against the said The Baltimore and Ohio Railroad Company for the sum of seven thousand dollars ($7,000.00), and the said The Baltimore and Ohio Railroad Company has obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment of the said court in the aforesaid suit, and a citation directed to the said Dora Goodman, as administratrix of the estate of Nathan Goodman, deceased, defendant in error, citing her to be and appear before the United States Circuit Court of Appeals for the Sixth Circuit to be holden at Cincinnati, in the State of Ohio, in said circuit, according to law within thirty days from the date hereof.

Now the condition of the above obligation is such that if the said The Baltimore and Ohio Railroad Company shall prosecute its said writ or error to effect and answer all damages and costs if it fail to make its plea

good, then the above obligation to be void, else to remain in full force and virtue.

The Baltimore and Ohio Railroad Company,
By Morison R. Waite,
Its Attorney in Fact.

United States Fidelity & Guaranty Company of Baltimore, Maryland,
By Bruce C. Shepherd,
Attorney in Fact.

Approved this the 11th day of May, A. D. 1925.
Smith Hickenlooper,
District Judge.

ORDER ALLOWING WRIT OF ERROR—Filed May 11, 1925.

This 11th day of May, A. D. 1925, came the defendant, The Baltimore and Ohio Railroad Company, by its attorney, and filed herein and presented to the court its petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly autenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, Cincinnati, Ohio, and upon giving such bond as may be required; that all further proceedings may be suspended until the determination of said writ of error by said United States Circuit Court of Appeals, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of error upon said defendant giving bond and filing same with the clerk of this court according to law in the sum of $250.00 to the effect that if the said defendant and plaintiff in error shall prosecute the said writ of error with effect and answer all damages and costs

if it fails to make its plea good, then the said obligation to be void, else to remain in full force and virtue, said bond to be approved by this court, which said bond shall operate as a supersedeas, and all further proceedings in this court shall be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals.

Smith Hickenlooper,
Judge of the District Court.

WRIT OF ERROR—Filed May 11, 1925.

To the Honorable Judge of the District Court of the United States for the Southern District of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, or some of you, between Dora Goodman, as administratrix of the estate of Nathan Goodman, deceased, plaintiff, and The Baltimore and Ohio Railroad Company, defendant, a manifest error hath happened, to the great damage of the said The Baltimore and Ohio Railroad Company, defendant, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in the State of Ohio, where said Court is sitting, within thirty (30) days from the date hereof in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals

may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, this 11th day of May, A. D. 1925.

Allowed this 11th day of May, A. D. 1925.

Smith Hickenlooper.
U. S. District Judge.

Attest:

B. E. Dilley,
Clerk of the District Court of the
United States, Southern District of Ohio.
Stephen T. Maloney,
Deputy.

CITATION.

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, in said Circuit, on the 10th day of June next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Southern District of Ohio, wherein The Baltimore and Ohio Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William H. Taft, chief justice, this 11th day of May, A. D. 1925.

Smith Hickenlooper,
United States District Judge.

Precipe.

We hereby this 9th day of May, 1925, accept the personal service of this citation on behalf of Dora Goodman, as administratrix of the estate of Nathan Goodman, deceased, defendant in error.

R. N. Brumbaugh,
I. L. Jacobson,
Attorneys for Defendant in Error.

PRECIPE—Filed May 11, 1925.

To the Clerk:

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Sixth Circuit, Cincinnati, Ohio, pursuant to a writ of error allowed in the above entitled cause and to include in such transcript of record the following papers, to wit:

1. Transcript on removal from the Common Pleas Court to the United States District Court, Dayton, Ohio.
2. The answer.
3. The reply.
4. Empaneling of jury.
5. The verdict.
6. The judgment.
7. The opinion of the court overruling motion for new trial.
8. Entry and stipulation extending time for filing bill of exceptions.
9. Bill of exceptions duly taken at the trial.
10. Stipulation and agreement as to bill of exceptions.
11. Petition for writ of error.
12. Assignment of errors.
13. Bond and approval.
14. Allowance of writ of error.
15. The writ of error.
16. Citation in error.
17. Clerk's certificate.

Marshall and Harlan,
Attorneys for The Baltimore & Ohio
Railroad Co., Defendant.

CLERK'S CERTIFICATE.

In pursuance of the command of the writ of error within, I, ..., Clerk of the United States District Court for the Southern District of Ohio, Western Division, hereby certify that the above and foregoing is a true, full and correct copy and transcript of the record, bill of exceptions, assignment of errors, and all proceedings in this case No. 149 wherein Dora Goodman, as administratrix of the estate of Nathan Goodman, deceased, was plaintiff, and The Baltimore and Ohio Railroad Company was defendant, as fully as the same remains on file and of record in my office.

Witness my official signature and the seal of said court at ....., the ..... day of ....., A. D. 1925.

.....,

Clerk of the District Court of the United States for the Southern District of Ohio, Western Division.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPEARANCE OF COUNSEL

(Filed June 8, 1925.)

ARTHUR B. MUSSMAN,
Clerk of said Court:

Please enter my appearance as counsel for the Plaintiff in Error.

MARSHALL AND HARLAN,
Attorneys for Plaintiff in Error.

CAUSE ARGUED AND SUBMITTED

(December 4, 1925—Before Donahue, Moorman and Knappen, JJ.)

This cause is argued by Mr. A. M. Marshall for the Plaintiff in Error and by Mr. Robert N. Brumbaugh for the Defendant in Error and is submitted to the Court.

JUDGMENT

(Filed January 5, 1926.)

Error to the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and the same is hereby affirmed with costs.

OPINION

(Filed January 5, 1926.)

No. 4421

UNITED STATES CIRCUIT COURT OF APPEALS
Sixth Circuit

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Plaintiff in Error,* vs. DORA GOODMAN, as Administratrix of the Estate of Nathan Goodman, Deceased, *Defendant in Error.*	ERROR to the District Court of the United States, Southern District of Ohio, Western Division.

Decided January 5, 1926.

Before DONAHUE, MOORMAN and KNAPPEN, Circuit Judges.

MOORMAN, Circuit Judge: This is an action for damages for the death of Nathan Goodman resulting from the collision of a truck with a railroad train at a grade crossing in an unincorporated village in Montgomery County, Ohio. The collision occurred in the daytime. The truck was moving eastwardly on the public highway and the train was running in a southwesterly direction. Plaintiff's evidence tended to show that deceased reduced the speed of the truck when about forty feet from the crossing from ten or twelve miles an hour to five or six miles, at which rate he was moving at the time of the collision; that the view of the tracks north of the crossing as one approached it from the west was obscured by buildings and other obstructions; that there was a tool shed on the right of way two hundred and forty-three feet north of the crossing, and twenty-four feet from the west track there was a store which obstructed the line of vision to the north; that deceased could not have seen the approaching train until he was

within twenty-four feet of the west rail of the west track, and even then could not have seen it beyond the tool shed; and according to calculations put in evidence he had practically no view to the north, from his position on the truck, until the front of it was less than twenty feet from the west rail. There was a dispute in the evidence as to whether adequate signals of the train's approach to the crossing were given. The court submitted to the jury the issues of negligence and contributory negligence and a verdict was returned in favor of plaintiff, upon which judgment was rendered.

The main contention here is that the trial court erred in refusing to direct the jury to return a verdict for defendant. It is not denied that the train was running at the rate of about sixty miles an hour, and Goodman was moving, immediately before the collision, at the rate of five or six miles an hour; consequently, when Goodman was eighteen feet west of the track the engineer was approximately two hundred and sixteen feet north of the crossing, each in view of the other. The engineer said he was maintaining a lookout the width of the right of way but did not see the truck until the moment of collision. It was not shown that Goodman looked or listened for the train, but there is a rebuttable presumption that he did both. *Beckham* v. *Hines, Agent* (6 C. C. A.) 279 Fed. 241. Plaintiff accounts for the engineer's failure to see the truck when it emerged from behind the store on the theory that the tool house obstructed his line of vision, which shows, as she contends, that the train was running faster than sixty miles an hour. That may or may not be true, or it may be thought there was a momentary diversion of attention, as a glance in another direction would have sufficed to prevent effective action and perhaps discovery in the brief time that elapsed before the two vehicles came in contact at the crossing—as to Goodman, for example, the looking to the south before looking north. It is suggested but not argued that there was no proof of negligence on the part of defendant. We do not think it necessary to discuss that question, since what has been said of the evidence as to the crossing signals sufficiently disposes of it.

It is of course true that Goodman was required to exercise, for his own safety, the degree of care that a reasonably prudent person ordinarily would exercise in the same or like circumstances, which included "the use of his faculties of sight and hearing." *Flannelly* v. *D. & H. Co.*, 225 U. S. 597. This imposed on him the duty of looking and listening when he could do so effectively. *Schofield* v. *C. M. & St. P. Ry. Co.*, 114 U. S. 615; *Philadelphia & R. Ry. Co.* v. *LeBarr*, 265 Fed. 129. Hence it is said that as the evidence shows he could have seen the train when within sixteen or eighteen feet of the track—whether he did or did not is immaterial—he was guilty of negligence as a matter of law, for if he did not he failed to look, or if he looked, failed to stop before going on the crossing, and in either circumstance it was the duty of the court to direct the jury to return a verdict for defendant.

The cases cited by defendant, among which are *Railroad Co.* v. *Houston*, 95 U. S. 697, and *Railroad Co.* v. *Freeman*, 174 U. S. 379, were decided on the particular facts under consideration and are not in contravention of the general rule announced in the Flannelly case, *supra*. *N. Y. Cent. & H. R. R. Co.* v. *Maidment*, 168 Fed. 21, cited as especially applicable, does not establish a standard of care for the driver of an automobile different from that required of the driver of horses, but recognizes, and rightly so, that the circumstances under which the former approaches a crossing are more favorable to the discovery of trains and to the stopping of his vehicle than those with which the latter must deal. That decision and others, including *Bradley* v. *Mo. Pac. R. Co.*, 288 Fed. 484, apply the rule more rigidly against the user of the highway than this court has been willing to do. We prefer to adhere to the interpretation of *Lake Erie & W. R. Co.* v. *Schneider*, 257 Fed. (6 C. C. A.) 675, and *Beckham* v. *Hines*, 279 Fed. (6 C. C. A.) 241. The seemingly less liberal cases of *Kallmerten* v. *Cowen*, 111 Fed. (6 C. C. A.) 297; *Shatto* v. *Erie R. Co.*, 121 Fed. 678, and *Fluckey et al.* v. *Southern Ry. Co.*, 242 Fed. 468, must be regarded as dealing with particular states of fact and not as conflicting with the later opinions of the court which allow—if not in terms, in the

adaptation of the general rule—"for modifying circumstances or for accidental diversion of the attention to which the most prudent and careful are sometimes subject." *Improvement Co.* v. *Stead*, 95 U. S. 161. Under these decisions we can not hold that Goodman was guilty of negligence as a matter of law.

The other question assigned and argued relates to the refusal to charge the jury as requested, viz.: that the operatives of the train were not required, in approaching the crossing, to take into consideration obstructions not on the right of way of defendant. It would be too lax a rule to permit a railway company to ignore the dangers of a crossing caused by obstructions not on the property of the company and to operate its trains as if the crossing were without the extraordinary dangers incident to its location. The duty of those operating a train to exercise ordinary care to avoid injuring persons about to use a railroad crossing clearly requires the taking into consideration of obstructions off the right of way that render the crossing more dangerous than it otherwise would be. It was not, therefore, error to refuse this charge.

Judgment affirmed.

PETITION FOR REHEARING

(Filed February 2, 1926.)

IN THE

United States Circuit Court of Appeals,

SIXTH CIRCUIT

No. 4421

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Plaintiff in Error,

vs.

DORA GOODMAN, AS ADMINISTRATRIX OF THE ESTATE OF NATHAN GOODMAN, DECEASED,

Defendant in Error.

PETITION FOR RE-HEARING

The undersigned, your petitioner, respectfully submits that it has been aggrieved by an opinion of your Honors rendered herein on the 5th day of January, 1926, in the respects hereinafter set forth, and prays for a re-hearing of said matter.

FIRST—SAID OPINION IS NOT SUPPORTED BY THE EVIDENCE IN THE FOLLOWING RESPECTS, TO-WIT: THE DECISION OF THE COURT SETS OUT

(a) "Plaintiff's evidence tends to show that deceased reduced the speed of the truck when about forty feet from the crossing from ten to twelve miles an hour to five or six miles."

(b) "That deceased could not have seen the approaching train until he was within twenty-four feet of the west rail of the west track and even then could not have seen it beyond the tool-shed."

(c) "The engineer said he was maintaining a lookout the width of the right of way, but did not see the truck until the moment of the collision. It was not shown that Goodman looked or listened for the train, but there is a rebuttal presumption that he did both."

Taking these questions of negligence up in their order, the only witness claiming to have seen Nathan Goodman on the road prior to the time that he reached a point 40 or 50 feet west of the crossing was Curtis Pettigrew. He testified (record 34): "When I first saw this locomotive, Mr. Goodman was just about right where he could see it, about 15 or 20 feet back. He was right there at the railroad property where it begins. I would say that Mr. Goodman was approaching the railroad tracks, in his truck, about 6 or 7 miles an hour and that the rate of speed he was going up the grade to the tracks was about half the

speed he was going when three or four hundred feet from the crossing."

This is the only evidence in the case suggesting a comparison of speed, and we respectfully insist does not warrant the statement in the opinion that "plaintiff's evidence tended to show that deceased reduced the speed of the truck when about forty feet from the crossing from 10 to 12 miles an hour to 5 or 6 miles." The only other witness claiming to have seen Nathan Goodman approaching the crossing was C. A. Hoffman. Hoffman testified (page 29): "When I first observed Nathan Goodman on this 6th day of November, 1923, he was approaching the crossing about probably 40 feet from the crossing, driving a Ford truck. * * * Just before I noticed Goodman approaching, and just before I saw the train, I heard a whistle. * * * After hearing this indistinct whistle, presently I turned my head a little to the right and saw the smoke of the train approaching, and heard it approaching. At the same time I saw this truck driving straight to the corner. That was when I first saw the truck. I don't think I had seen the truck before that. That is the first time that I remember of taking notice that there was a truck there (record 30). At that time the truck on the road was about 50 feet from the crossing. * * * I was attracted by this truck, saw the truck going slowly up the grade toward the track, and as I looked the train came into position where I could see it distinctly running toward the crossing. Well, the truck kept on at the same rate of speed, slowly approaching the crossing. From the time I observed Goodman's truck, about 40 or 50

feet away from the crossing, there was no warning signal that I heard until the train blew just before it struck the truck. I would say that the train was maybe 100 feet from the crossing, anywhere from 50 to 100 feet from the crossing, and that this whistle was blown about a second before the crash. At the time this last blast was given the train was between the section-house and the crossing."

Coming to subdivision (b) of this portion of our petition, we respectfully contend that "plaintiff's evidence does not tend to show that deceased, when 24 feet from the west rail of the west track, could not have seen beyond the tool-shed."

W. P. Rice testified (record 25): "After passing this storeroom and stepping on the right of way, if you would look north, you would see the tool-house which, I think, is about 80 yards from the crossing; at that point, my judgment would be that you could possibly see 150 feet farther north on the main line of the track, standing on the right of way. * * * From the time that the right of way of the railroad was reached in approaching that crossing from the west, you could look 140 or 150 feet north of that tool-house and could see north down the track from the time you reached the right of way."

We can find no evidence in the record that disputes this, and all of the evidence, including the exhibits, one of which is plaintiff's exhibit A (record 73), shows that immediately upon coming to the right of way there is opportunity to see a considerable distance beyond the tool-house.

We contend that there is no "rebuttal presumption that Goodman looked or listened." We insist that the undisputed facts show that either Nathan Goodman did not look, or if he did look, he failed to heed what he saw; that the undisputed facts in this case make it so clear as to warrant no other inference in that the deceased in the use of his senses could have seen the approach of this train if he had looked at the time he reached the crossing in time to have seen the train and permitted it to pass.

Erie R. R. Co. vs. Weinstein, 166 Fed. Rep. 271-275.
Rollins vs. C. M. & St. P. Ry. Co., 139 Fed., 639.
Wabash Ry. Co. v. Huelsmann, 290 Fed. Rep. 165 (8th C. C.)
Horn vs. B. & O. R. R. Co., 54 Fed., 301.

Engineer F. O. Miller testified (record 38): "I first saw the truck after I had passed the section-men's tool-house. * * * I did not see anything of the truck until the truck was right up to the rail (record 39). When I saw the accident was inevitable and in order to keep from getting hit myself, I put my body inside the cab and at the same time had hold of the whistle rope. * * * As I approached the crossing, I was looking straight ahead and running between 55 and 60 miles an hour, which is the regular and ordinary speed of that train. * * * I was practically upon this truck before I saw it, and after I saw it there was nothing to be done to prevent the accident. * * * Coming straight down the track to the south, if I desired to have some view of this east (record 40) and west road, I could possibly have seen within 40 or 50 feet of the track to the west of our right of way."

Under all the holdings, an engineer is required to keep a lookout straight ahead, and this he was doing. He was in an entirely different position from Nathan Goodman, who was approaching the crossing at a low rate of speed and with nothing to prevent his seeing the engine at least from the instant he reached the right of way.

SECOND—THE DECISION OF THE COURT IS CONTRARY TO THE LAW OF THE CASE AND THE WEIGHT OF AUTHORITY.

The trial court in this case handed down a very carefully considered written opinion, which is a part of the record in this case.

Your Honors say that these decisions apply the rule more rigidly against the use of the highway than this court has been willing to do, and, if we rightly interpret your decision, agree with the opinion of the trial judge in his statement as set out on page 19 "that the weight of authority elsewhere would seem to demand a new trial." We would further understand this court's decision to be based upon what you designate as "the later opinions of this court."

In presenting this case originally we contended that the facts in this case warrant the application of the law as set down in the cases of Kallmartin vs. Cowen, et al., 111 Fed. Rep., 297, Shatto, vs. Erie, 121 Fed., 678 and Fluckey vs. Southern Ry. Co., 242 Fed., 468 (C. C. A. 8), also Horn vs. Baltimore and Ohio Railroad Company, 54 Fed., 301.

One of the judges in this Horn case was Judge Taft, now Chief Justice of the Supreme Court of the United States.

We further contend that the statement of facts as set out by your Honors shows an action where stopping was absolutely required on the part of Nathan Goodman as he approached and went upon the track. The undisputed evidence shows that he did not stop; that he approached this track at the same speed with which he was approaching when at least 40 or 50 feet west of the west rail.

If the view was obstructed, as your Honors seem to have found, is it not plain as held by this Court in the Shatto case, 121 Fed., 678, that the facts required Nathan Goodman to stop, otherwise he could not make use of his faculties of sight and hearing.

THIRD—THE REFUSAL OF THIS COURT TO SET ASIDE THIS JUDGMENT BECAUSE OF THE CHARGE WHICH THE TRIAL COURT FAILED AND REFUSED TO GIVE, IS ERRONEOUS.

Your Honors in referring to the charge asked by defendant below, now plaintiff in error (record 56) reading:

> "As a railroad company has no control over the trees, weeds, brush, shrubbery, and the like, not on its right of way, it is not required to take such things into consideration when approaching a crossing,"

Say:

> "It would be too lax a rule to permit a railway company to ignore the dangers of a crossing caused by obstructions not on the property of the company to operate its trains as if the crossing were without the extraordinary dangers incident to its location. The duty of those operating a train to exercise ordinary care to avoid injuring persons about to use a railroad crossing clearly requires the taking into consideration of obstructions off the right of way that render the crossing more dangerous than it otherwise would be, it was therefore not error to refuse this charge."

This charge is in the language of the 7th syllabus of Railroad Company vs. Kistler, 66 O. S. 326. The Supreme Court of Ohio, on page 342, says:

> "The trees, shrubbery and weeds outside of the right of way, imposed no care or caution upon the company in running its train."

If the law requires a Railroad Company to take into consideration obstructions to view outside of the right of way, how can an engineer properly discharge his duties? We respectfully contend that the holding in the Kistler case is justified by every reasonable consideration.

As the Supreme Court of Ohio says, in the Kistler case, page 341:

> "Whatever the engineer and those on the engine with him would see while in the proper

discharge of their duties, they are chargeable with having seen, **but they are not required to neglect their duties on the train to look outside of the right of way for approaching persons or animals, not within the range of vision while looking ahead along the track."**

The engineer in this case testified that he was looking straight ahead (record 39) and in so looking he was not called upon and would not take into consideration obstructions outside the right of way. It would seem to us that any other rule would place upon a railroad company unreasonable requirements and that all of the responsibility would be placed upon the railroad company and its employees and no responsibility upon an automobile driver. The observations of every one every day make the reason of the rule as laid down by the Supreme Court of Ohio just and clear.

FOURTH—THE FACTS IN THIS CASE DO NOT JUSTIFY THE CHARGE OF THE COURT TO THE JURY REFERRED TO IN THE FOURTH ASSIGNMENT OF ERRORS.

The part of the charge objected to reads (Record 83):

"But the railway company is also bound to give such signals as would be given by reasonably prudent persons under the particular circumstances in the case, even though they be in addition to the signals prescribed by statute"; also,

"It is thus prescribed that at not more than 1650 feet from the crossing, nor less than 1300 and some odd feet, which is 80 rods from the

> crossing, the crossing whistle shall be blown. It is also prescribed that the bell shall be rung until the crossing shall have been passed. This may be said to be the minimum requirement which is imposed upon the railway as to such signals. It is not the definition of their entire duty, for that duty is only achieved or performed by using such care under the particular circumstances of the case as reasonably prudent operators would use.

A reading of the opinion of your Honors fails to show any reference to this claim of error. We respectfully contend that the facts in this case do not justify submitting to the jury the question of additional signals over and above those set down in the statutes of Ohio. We respectfully cite in support of this contention a decision handed down by his Honor Judge Denison of this Sixth Circuit in case 4120, The Baltimore and Ohio Railroad Company plaintiff in error, vs. Alfred Reeves, defendant in error. (This decision has just been filed, and we are unable to give the Federal Reporter reference.)

FIFTH—THE CONTRIBUTORY NEGLIGENCE OF PLAINTIFF APPEARS AS A MATTER OF LAW, AND THE MOTION TO DIRECT A VERDICT SHOULD HAVE BEEN SUSTAINED.

Discussion heretofore set out substantially covers this phase of our petition for rehearing. If this crossing was one where Nathan Goodman could not see until practically upon the track and consequently he could not make use of his faculties of sight and hearing without stopping, his clear duty was not only to

look as soon as he could see, but to have his machine under such control that, if necessary, he could stop before going into the danger zone.

Fluckey vs. Southern Railway Co., 242 Fed., 468 (C. C. A., 6);

Also see:

Erie Railroad Co. vs. Hurlburt, 221 Fed., 907. (C.C.A. 6)

Where there is obstruction to sight or hearing and where the surroundings are such that but one conclusion can be reasonably drawn and that conclusion is that it is negligence to proceed without halting, the court should, without hesitation, direct a verdict if no halt is made.

In Shatto vs. Erie, 121 Fed., 678, Elliott on Railroads, Section 1167, is cited:

> "There is, however, a substantial agreement on the proposition that, when a reasonably effective observation cannot be made without stopping, then the traveler must stop and look and listen."

If Nathan Goodman had done this, there would have been no accident.

We again bring to the attention of this Court the decision of the trial judge, and conclude this petition for re-hearing with his words (record 19):

> "This action is taken although it appears to the court that better reason and the weight of authority elsewhere would seem to demand a new trial and although submission of the case to the

jury in this and similar actions is too prone to introduce elements of the doctrine of comparative negligence which should be excluded from consideration."

WHEREFORE, and for the reasons above set out, your petitioner respectfully urges that a re-hearing may be granted, and that the mandate of this Court may be stayed pending the disposition of this petition.

Respectfully submitted,

THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff in Error.

By Marshall and Harlow
Its Attorneys.

STATE OF OHIO,
COUNTY OF MONTGOMERY, SS.:

I, A. McL. Marshall, of Dayton, Ohio, an attorney regularly admitted to practice in the United States Circuit Court of Appeals, for the Sixth Circuit, do certify that in my opinion the foregoing petition for re-hearing in the case of The Baltimore and Ohio Railroad Company, plaintiff in error, vs. Dora Goodman, as administratrix of the estate of Nathan Goodman, deceased, defendant in error, No. 4421, is well founded and is not presented for the purpose of creating a delay.

A. McL. Marshall.

February 1, 1926.

ORDER DENYING PETITION FOR REHEARING

(Filed March 12, 1926.)

The petition for rehearing of this cause is hereby denied.

MOTION FOR STAYING ISSUANCE OF MANDATE

(Filed March 19, 1926.)

To the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

Now comes The Baltimore and Ohio Railroad Company, plaintiff in error in the above entitled case, by its attorneys, and respectfully prays this Court to stay the issuing of the mandate to the court below, The United States District Court, affirming the action of said District Court and the judgment rendered therein in favor of plaintiff below, now defendant in error, for a period of thirty (30) days in order to permit of the preparation of the printed record and petition for writ of certiorari to the Supreme Court of the United States and filing same in said Supreme Court.

Your applicant respectfully says that said period of time is necessary and in the interest of justice, and this motion is not presented for the purpose of creating delay.

THE BALTIMORE & OHIO RAILROAD CO.

By MARSHALL & HARLAN,
Attorneys for Plaintiff in Error.

ACKNOWLEDGMENT OF SERVICE

(Filed March 19, 1926.)

Receipt and service upon the undersigned counsel for Dora Goodman, as administratrix of the estate of Nathan Goodman, deceased, defendant in error, and each of us, of copy of motion of The Baltimore and Ohio Railroad Company, plaintiff in error, for stay of mandate, is hereby acknowledged this 18th day of March, 1926.

R. N. BRUMBAUGH,
T. S. JACOBSON,
Attorneys for Dora Goodman, as administratrix of the estate of Nathan Goodman, deceased, Defendant in Error.

ORDER STAYING MANDATE

(Filed April 6, 1926.)

Ordered, that motion to stay mandate herein pending application to the Supreme Court for writ of certiorari, is hereby granted subject to the following condition: the applicant shall within thirty days from the date of this order file petition for the writ in the Supreme Court, give the notice to opposing counsel required by Supreme Court Rule 35 and file in this court proof of such filing and notice. Unless this condition is complied with, the mandate herein will issue either upon the court's own motion and without notice, or upon motion of opposing party upon notice, as to the court may seem best; but in the event of such compliance the mandate will be stayed until final action in the case is taken by the Supreme Court.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, ARTHUR B. MUSSMAN, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of The Baltimore & Ohio Railroad Company v. Dora Goodman, as Administratrix of the estate of Nathan Goodman, deceased, No. 4421, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this eighth day of April, A. D., 1926.

ARTHUR B. MUSSMAN,
[SEAL] Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1925

No. 1161

THE BALTIMORE AND OHIO RAILROAD COMPANY, Petitioner,

vs.

DORA GOODMAN, Administratrix of the Estate of Nathan Goodman, Deceased

ORDER ALLOWING CERTIORARI—Filed June 1, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
APR 29 1926
WM. R. STANSBURY
CLERK

No. 11[redacted] [redacted] 58

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1925

The Baltimore and Ohio Railroad Company,
Petitioner.

vs.

Dora Goodman, Administratrix of the Estate of Nathan Goodman, Deceased,
Respondent.

Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit.

A. McL. Marshall
Byron B. Harlan
Morison R. Waite
and
William A. Eggers
Counsel for Petitioner

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No.....

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1925.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Petitioner. vs. DORA GOODMAN, ADMINISTRATRIX OF THE ESTATE OF NATHAN GOODMAN, DECEASED. Respondent.	Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, The Baltimore and Ohio Railroad Company, presents this petition because of the importance of the question involved, and because of a conflict in various Circuit Courts of Appeals as to whether a traveler by automobile on the highway is required to stop when the view at a crossing is ob-

structed, and is required to look, and is bound to see what could have been seen had he looked. Your Petitioner thus concisely states the questions involved, and respectfully shows:

Dora Goodman, Administratrix of the Estate of Nathan Goodman, deceased, on February 7, 1924, (R. 1) in the Court of Common Pleas of Montgomery County, Ohio, brought suit against The Baltimore and Ohio Railroad Company to recover damages on account of the death of Nathan Goodman, alleged to have been sustained in a railroad crossing collision at a small unincorporated village known as Whitfield, Montgomery County, Ohio. (R. 1.) On account of diversity of citizenship, on March 17, 1924, the suit was removed to the United States District Court for the Southern District of Ohio, Western Division, Dayton, Ohio. (R. 1.) The Circuit Court of Appeals in its opinion (10 Fed. Rep. (2) 58), said: (R. 92.)

> "The collision occurred in the day time. The truck was moving eastwardly on the public highway and the train was running in a southwesterly direction. Plaintiff's evidence tended to show that deceased reduced the speed of the truck when about forty feet from the crossing from ten to twelve miles an hour to five or six miles, at which rate he was moving at the time of the collision; that the view of the tracks north of the crossing as one approached it from the west was ob-

scured by buildings and other obstructions; that there was a tool shed on the right of way two hundred and forty-three feet north of the crossing, and twenty-four feet from the west track there was a store which obstructed the line of vision to the north; that deceased could not have seen the approaching train until he was within twenty-four feet of the west rail of the west track and then could not have seen it beyond the tool shed; and according to calculations put in evidence he had practically no view to the north, from his position on the truck, until the front of it was less than twenty feet from the west rail. There was a dispute in the evidence as to whether adequate signals of the train's approach to the crossing were given. The court submitted to the jury the issues of negligence and contributory negligence and a verdict was returned in favor of plaintiff, upon which judgment was rendered."

The trial court in its opinion (R. 14) said in part:

"There were certain obstructions to the view northward which prevented seeing any great distance up the track, but from a point eighteen or twenty feet west of the rails a traveler on the highway could see approximately 1,560 feet from the crossing to the whistling post."

Judgment was entered, Feb. 2, 1925. (R. 21.)

Your petitioner, May 11, 1925, sued out a writ of error to the Circuit Court of Appeals for the Sixth

Circuit, (R. 81) and the judgment appealed from was affirmed January 5, 1926, (R. 91) and a petition for rehearing was denied March 12, 1926, (R. 109). Order staying the Mandate was filed April 6, 1926 (R. 110).

It was the contention of the Railroad that the better law among the conflicting circuits was that the decedent under the circumstances was bound to use his faculties of looking and listening, and that where the view was obstructed, as here, he was as a matter of law bound to stop, for the purpose of assisting him in the exercise of the faculties of looking and listening and that he was bound to look and was bound to see what could have been seen had the decedent looked. (R. 10, 12.)

In its decision on the motion for a new trial the court, Hickenlooper, J., said: (R. 14, bottom.)

> "The aspect of the evidence most favorable to the plaintiff can at most establish that if the decendent looked at all for approaching trains he looked first to the south, and when looking to the north the train was already so close that the automobile could not be stopped. The view to the south was not obstructed to the same extent as that to the north, and no explanation is given why a traveler familiar with the surroundings could not have directed his sole attention to the north immediately upon passing the obstruction on that side."

In commenting upon the doctrine which your petitioner contended was the law, the trial court further said: (R. 16, bottom.)

> "It is possible that the almost universal use of automobiles and the assurance which the 'ordinary prudent' driver feels in his ability to cross quickly and to stop quickly may have established a slightly different standard of care on the part of the traveler, if we are to judge this standard by the act of the originarily prudent driver. If, however, there still rests upon the driver of an automobile the duty *to look where looking will be effective, and if he is charged with seeing that which he must have seen had he looked, and if (which is not here disputed) obstructions to the view but increase his duty to use care and make almost mandatory the requirement that he either stop or have his car under control as to be able to stop within a very short distance, in order that he may be sure of his safety, it would appear to this court as a thoroughly logical development of the law that the accident itself is proof positive that the driver failed in some one or more of these obligations so imposed upon him.*
>
> *"This doctrine is practically in effect in at least two circuits.* We use the word 'practically' because while not adopted in the broad language and effect here stated, the doctrine of contributory negligence in the operation of an automobile has been so applied as to practically lead to such conclusion." (Italics ours.)

While the trial court said that this doctrine strongly appealed to him as the logical consequence of the duties imposed upon the traveler upon the highway, still it passed the question in the following language: (R. 19, bottom.)

> "The question is directly raised in the present suit, and so often rises in railway litigation, that we consider it advisable to determine it in this instance adversely to the railway company and thus to permit its presentation squarely to the Court of Appeals. In the event of affirmance, the plaintiff will not lose the advantage already gained, and the court will not be required to re-try the case. In the event of reversal, the action will be at a practical end, even though final judgment may not be entered above. This action is taken although it appears to the court that better reason *and the weigh of authority elsewhere would seem to demand a new trial* and although submission of the case to the jury in this and similar actions is too prone to introduce elements of the doctrine of comparative negligence which should be excluded from consideration." (Italics ours.)

The Circuit Court of Appeals, in disposing of the question, said: (R. 94, top.)

> "It is of course true that Goodman was required to exercise, for his own safety, the degree of care that a reasonably prudent person ordinarily would execise in the same or like circumstances, which included "the use of his fa-

culties of sight and hearing." Flannelly v. D. & H. Co., 225 U. S. 597. This imposed on him the duty of looking and listening when he could do so effectively. Schofield v. C. M. & St. P. Ry. Co., 114 U. S. 615; Philadelphia & R. Ry. Co. v. LeBarr, 265 Fed. 129. Hence it is said that as evidence shows he could have seen the train when within sixteen or eighteen feet of the track—whether he did or no is immaterial—he was guilty of negligence as a matter of law, for if he did not and failed to look, or if he looked, failed to stop before going on the crossing, and in either circumstances it was the duty of the courts to direct the jury to return a verdict for defendant.

The cases cited by defendant, among which are Railroad Co. v. Houston, 95 U. S. 697, and Railroad Co. v. Freeman, 174 U. S. 379, were decided on the particular facts under consideration and are not in contravention of the general rule announced in the Flannelly case, supra. New York Central & H. R. R. Co. v. Maidment, 168 Fed. 21, cited as especially applicable, does not establish a standard of care for the driver of an automobile different from that required of the driver of horses, but recognizes, and rightly so, that the circumstances under which the former approaches a crossing are more favorable to the discovery of trains and to the stopping of the vehicle than those with which the latter must deal. *That decision and others, including Bradley v. Mo. Pac. R. Co.,* 288 *Fed.* 484, *apply the rule more rigidly against the user of the highway than this court has been willing to do.* We prefer to adhere to the inter-

> pretation of Lake Erie & W. R. Co. v. Schneider, 257 Fed. (6 C. C. A.) 675, and Bechman Hines, 279 Fed. (6 C. C. A.) 241. The seemingly less liberal cases of Hallmerten v. Cowen, 111 Fed. (6 C. C. A.) 297; Shatto v. Erie R. Co., 121 Fed. 678, and Fluckey, et al vs. Southern Ry. Co., 242 Fed. 468 must be regarded as dealing with particular states of fact and not as conflicting with the later opinions of the court which allow—if no in terms, in the adaptation of the general rule,—'for modifying circumstances or for accidental diversion of the attention to which the most prudent and careful are sometimes subject.' Improvement Co. v. Stead, 95 U. S. 161. Under these decisions we cannot hold that Goodman was guilty of negligence as a matter of law" (Italics ours).

In view of the importance of the question involved to the railroads of this country owing to the large number of highway crossings at grade and the large number of automobiles traveling over those highway crossings, the conflict in the opinions of the Circuit Courts of Appeals on the question, we submit, should in the interest of uniformity be decided by this Court and we contend further that it should be decided in accordance with those circuits that "apply the rule more rigidly against the user of the highway than the Sixth Circuit has been willing to do."

Your petitioner presents herewith, as a part of this petition, a certified copy of the transcript of the record in the courts below, and will present its brief for consideration with this petition, discussing at

greater length the questions involved.

WHEREFORE, Your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth District, commanding said Court to certify and send to this Court, on a day certain to be therein designated a full and complete transcript of the record of proceedings in said court, entitled "The Baltimore and Ohio Railroad Company, Plaintiff in Error, vs. Dora Goodman, as Administratrix of the Estate of Nathan Goodman, Deceased, Defendant in Error", and numbered 4421 in said Court, to the end that said case may be reviewed and determined by this Court, and that the petitioner may have such relief as this Court may deem proper, and that the opinion and judgment of said Circuit Court of Appeals and of said District Court may be reversed by this honorable Court.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

By A. M. & L. Marshall

Byron B. Harlan

Monson R. Waite

William A. Eggers

Its Attorneys.

State of Ohio, County of Hamilton, ss:

William A. Eggers, being duly sworn, on his oath says, that he is one of the counsel for The Baltimore and Ohio Railroad Company, Petitioner herein; that the foregoing petition was prepared under his instruction and under his supervision, and that he has carefully read the same and believes the allegations therein are true.

William A. Eggers

Subscribed and sworn to before me this 26th day of April, A. D., 1926.

Paul Oswald
Notary Public,
Hamilton County, Ohio.

My commission expires. Mar. 26. 1927

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No.....

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1925.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Petitioner.

vs.

DORA GOODMAN, ADMINISTRATRIX OF THE ESTATE OF NATHAN GOODMAN, DECEASED.

Respondent.

Petitioner's Brief In Support of Petition for Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit.

I.

STATEMENT OF FACTS AND PLEADINGS.

We set forth the facts as found to exist by the Circuit Court of Appeals in its opinion (10 Fed. Rep. (2) 58), and quote from the beginning of the opinion: (R. 92.)

> "The collision occurred in the day time. The truck was moving eastwardly on the public highway and the train was running

in a southwesterly direction. Plaintiff's evidence tended to show that deceased reduced the speed of the truck when about forty feet from the crossing from ten to twelve miles an hour to five or six miles, at which rate he was moving at the time of the collision; that the view of the tracks north of the crossing as one approached it from the west was obscured by buildings and other obstructions; that there was a tool shed on the right of way two hundred and forty-three feet north of the crossing, and twenty-four feet from the west track there was a store which obstructed the line of vision to the north; that deceased could not have seen the approaching train until he was within twenty-four feet of the west rail of the west track and then could not have seen it beyond the tool shed; and according to calculations put in evidence he had practically no view to the north, from his position on the truck, until the front of it was less than twenty feet from the west rail. There was a dispute in the evidence as to whether adequate signals of the train's approach to the crossing were given. The court submitted to the jury the issues of negligence and contributory negligence and a verdict was returned in favor of plaintiff, upon which judgment was rendered."

The trial court in its opinion (R. 14) said in part:

"There were certain obstructions to the view northward which prevented seeing any great distance up the track, but from a point

> eighteen or twenty feet west of the rails a traveler on the highway could see approximately 1,560 feet from the crossing to the whistling post."

From the opinions, both that of the trial court (R. 14) and that of the Circuit Court of Appeals, it is evident that the position of the Railroad Company was definitely asserted at every available point, and that the Railroad Company was consistent in the trial court and in the Circuit Court of Appeals as to its position.

II.

THIS COURT SHOULD ENTERTAIN JURISDICTION.

We submit that it is apparent from the opinions of the trial court and of the Circuit Court of Appeals that there is a conflict in the decisions of the Circuit Courts of Appeals on the questions here involved. We will later point this out in detail. It hardly needs more than the mere statement to prove that the questions are of great importance, especially to the railroads. They were important when the questions first arose, and are of more importance today, because of the increase in the number of automobiles and improved highways. We contend that there should be uniformity on these questions in the federal courts.

Many of the railroads are of such length that

they traverse the jurisdictions of different Circuit Courts of Appeals. For example, the petitioner, The Baltimore and Ohio Railroad Company, has lines extending from St. Louis, Missouri and Chicago, Illinois, on the west to the City of New York on the east.

On the importance of the question, we quote from the opinion of the Third Circuit Court of Appeals in the Maidment case, 168 Fed. 21, at page 23, as follows:—

> "With the coming into use of the automobile, new questions as to reciprocal rights and duties of the public and that vehicle have and will continue to arise. At no place are those relations more important than at the grade crossings of railroads. The main consideration hitherto with reference to such crossings has been the danger to those crossing. A ponderous, swiftly moving locomotive, followed by a heavytrain, is subjected to slight danger by a crossing foot passenger, or a span of horses and a vehicle; but, when the passing vehicle is a ponderous steel structure, it threatens, not only the safety of its own occupants, but also those on the collid ing train. And when to the perfect control of such a machine is added the factor of high speed, the temptation to dash over a track at terrific speed makes the automobile, unless carefully controlled, a new and grave element of crossing danger. On the other hand,

when properly controlled, this powerful machine possesses capabilities contributing to safety. When a driver of horses attempts to make a crossing and is suddenly confronted by a train, difficulties face him to which the automobile is not subject. He cannot drive close to the track, or stop there, without risk of his horse frightening, shying, or overturning his vehicle. He cannot well leave his horse standing, and if he goes forward to the track to get an unobstructed view and look for coming trains he might have to lead his horse or team with him. These precautions the automobile driver can take, carefully and deliberately, and without the nervousness communicated by a frightened horse. It will thus be seen an automobile driver has the opportunity, if the situation is one of uncertainity, to settle that uncertainty on the side of safety, with less inconvenience, no danger, and more surely than the driver of a horse. Such being the case, the law both from the standpoint of his own safety and the menace his machine is to the safety of others, should, in meeting these new conditions, rigidly hold the automobile driver to such reasonable care and precaution as to go to his own safety and that of the traving public. If the law demands such care, and those crossing make such care, and not chance, their protection, the possibilities of automobile crossing accidents will be minimized. In the case of trolleys crossing railroads at grade, the practice is general for the conductor to go ahead and from the track

> signal the halted car to advance. This would, of course, be impracticable as a rule for automobiles; but it illustrates the trend of the law, as the size of crossing vehicles makes collision with them more serious, to enforce greater safety precautions."

We submit that these prophetic observations, made in the year 1909, are as sound today as when first written. The importance of the question can hardly be overstated.

III.

POINTS AND AUTHORITIES.

1. A traveler on a highway passing over a railroad crossing at grade is guilty of contributory negligence barring a recovery if he fails to stop where the view is obscured.

C. M. & St. P. R. Co. v. Bennett, 181 Fed. 799, 803, 804.
Bradley v. Missouri Pacific R. Co., 288 Fed. 484, 487.
Northern Pacific R. Co. v. Tripp, 220 Fed. 286, 287, 290.
Neininger v. Cowan, et al., 101 Fed. 787, 788, 791, 792.
Dernberger v. B. & O. R. R. Co., 234 Fed. 405, 412, 413, 415.
N. Y. C. & St. L. R. Co. v. Maidment, 168 Fed. 21, 23, 24, 25.

Brommer v. Pennsylvania R. Co., 179 Fed. 577, 579, 582.
Payne v. Shotwell, 273 Fed. 806.
Payne v. D. L. & W. R. Co., 8 Fed. (2d) 138.

2. A traveler on the highway over a railroad crossing at grade who fails to look and see what could have been seen had he looked is guilty of contributory negligence barring a recovery.

B. & O. R. R. Co. v. Fidelity Storage Co., 2 Fed. (2d) 310, 312.
Wabash Ry. Co. v. Huelsmann, 290 Fed. (2d) 165, 166.
A. T. & S. F. Ry. Co. v. McNulty, 285 Fed. (2d) 97, 101.
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Hickey v. M. P. R. R. Corp., 8 Fed. (2d) 128, 131.

IV.

SPECIFICATIONS OF ERROR.

1. The District Court and the Circuit Court of Appeals erred in failing to hold that the decedent was guilty of contributory negligence barring a recovery, in failing to stop before passing over the crossing.

2. The District Court and the Circuit Court of Appeals erred in failing to hold that the decedent was

guilty of contributory negligence barring a recovery because the decedent did not see the train approaching in time to prevent the accident.

V.

ARGUMENT.

The points involved are essentially questions of law.

The facts as found by the trial court and by the Circuit Court of Appeals are, we submit, most favorable to the position of the respondent. There were obstructions to the view, but at a point twenty feet from the track the traveler on the highway had a view of fifteen hundred feet. It was the contention of the Railroad that under these circumstances the traveler on the highway was obliged to stop, if the view was obscured as contended, and in addition was bound to look at a point where a view was available, and that a view was available at any time after he reached a point twenty feet from the track, and further that he was bound to see what could have been seen had he looked at that point.

As we have heretofore indicated, the trial court in its opinion denying the motion for a new trial admitted the force of the position of the Railroad, and admitted the force of the decisions of various Circuit Courts of Appeals cited by the Railroad in support of its position, but denied the motion for a new trial with the hope that the case would be taken to the Circuit

Court of Appeals. That, of course, was done, but the Circuit Court for the Sixth Circuit, while admitting the force of the contention made by the Railroad and the force of the decisions of other Circuit Courts, nevertheless, took the position that it favored a "liberal" application of the rule, and characterized the rule as found in the decisions of the Circuit Courts to which the Railroad called attention as being too rigid for adoption by the Sixth Circuit Court of Appeals.

We respectfully call attention to decisions in the Circuit Courts for the Eighth, Fourth and Third Circuits, as setting forth the rules which, we submit, should be in force in the federal courts for the purpose of securing uniformity, and because the rules as construed and applied in those Circuits present a sounder view of the law.

(a) Decisions in the Eighth Circuit.

C. M. & St. P. R. Co. v. Bennett, 181 Fed. 799, is typical. The crossing was in a cut eight feet deep. The view was obstructed by an orchard, locusts, weeds and a barn, so that the plaintiff could see nothing of the railroad or of any trains upon it between the points thirty rods south of the crossing and twenty feet south of the south rail. The plaintiff was familiar with the crossing and with its surroundings. He was driving a pair of horses at the time of the accident. He could see nothing upon the

railroad until twenty-five feet from the south rail. He did not stop his horses at any time. The court at page 803 approved the general rule laid down in Davis v. C. R. I. & P. R. Co., 159 Fed. 10, 16, as being just and reasonable, and said that it was supported by decisions of other courts. In concluding the opinion, the court said:

> "If the plaintiff had stopped his horses just before he drove them into their dangerous position, stilled the noise of their feet, of the wagon, and of the brakes, and then listened, he would probably have heard the approaching train and have escaped his injury."

It is true that the distances in our case are not exactly the same as the distances in the Bennett case; still, the Circuit Court of Appeals and the District Court fixed it as from 18 to 20 feet with a view of 1,560 feet. We submit that this should make no different whatever in so far as principle is concerned.

In Bradley v. Missouri Pacific, 288 Fed. 484, it was undisputed that from a point 49 feet east of the track an engine would be visible to a point 800 feet north of the crossing. At the bottom of page 487 of the opinion, the court says:

> "The duty of a party approaching a railroad crossing, a known place of danger, is to look at an effective point for approaching trains. If one sees the approaching train, then of course there is no need for listening; but if the view is obscured, it is the duty to listen,

> and if the noise of the automobile or conveyance is such as to prevent effective listening, then to stop and listen. A party might be excused from looking or listening at any particular point in approaching a railroad track by the intent to look or listen at a more advantageous one, but he can not be excused for failure to look or listen at some effective place, and if by looking or listening he can ascertain the approach of a train, and fails to do so, he is guilty of contributory negligence."

Although the distance in this case is a little greater than the distance that the decedent in the case under consideration had available for view, still the principle, we contend, is the same. The view existed, but if the traveler on the highway felt that there was any obstruction to the view, then he should have increased the effectiveness of looking and listening by stopping his automobile.

In Northern Pacific R. Co. v. Tripp, 220 Fed. 286, there was a view northward of 800 feet, beginning 43 feet from the track. In holding the plaintiff guilty of contributory negligence in failing to see an approaching train under these circumstances, the court said, at page 290:—

> "The obstruction to the west, instead of being an excuse, was a warning, not only that he was in danger from that direction, but also from the other direction, because of his lack of attention there. Under such

circumstances, his duty was plain. He should have taken time in which to glance in the opposite direction, where the slightest glance would have shown his danger, or he should have exercised his control over his vehicle, so that he could listen for approaching trains, or have stopped it, if necessary, until he could use his senses of sight and hearing, and the failure to do so was negligence on his part."

(b) Decision in the Fourth Circuit.

In Neininger v. Cowan, et al., 101 Fed. 787, the plaintiff was driving a wagon. There were obstructions to the view until one came within 10 feet of the track, and at that point there was an available view of 64 feet on the railroad track. Had the driver crossed to the east side of the street, his view would have improved so that from a point 18 or 20 feet from the railroad he would have had an unobstructed view of the railroad from any direction. The plaintiff did not stop. He claims he listened for a train and heard neither the bell nor whistle nor the puffing of the engine nor the noise of the train. The court at page 791 said:—

"His plain duty, approaching that crossing, was to stop, look and listen. Had he instead of going on the west side of the street gone on the opposite side, he could have looked upon the track up and down, before he reached the crossing."

And further, at page 792:—

> "Plaintiff did not hear this,—whether from inattention or because of the noise of his moving wagon, does not appear. He did not hear. All the more was it his duty to stop. Ordinary caution would have compelled him to stop. Had he done so before crossing the track, the accident could not have happened."

In Dernberger v. B. & O. R. R. Co., 234 Fed. 405, the Neininger case is followed and approved by the District Court. The facts were that at a point 16 feet from the track there was an unobstructed view of the railroad of from 30 to 40 yards, one witness fixing it at rods instead of yards. The court directed a verdict in favor of the Railroad Company. At the bottom of page 413 of the opinion it is said:—

> "These authorities demonstrate that in the Second, Third, Eighth and Ninth Circuits the rule is established that where the view is obstructed, it becomes the duty of the traveler in a conveyance liable to make noise calculated to interfere with effective hearing, it is his duty to stop, as well as to look and listen, and it is to be noted that these cases strongly emphasize, what common sense dictates should be so, that the stop must be made just before going on the track, and not so far before such approach as to run any risk of it being ineffective. A careful examination has failed to disclose any different rulings upon the other Federal Circuits."

(c) Decision in the Third Circuit.

In N. Y. C. & St. L. R. Co. v. Maidment, 168 Fed. 21, the plaintiff was driving an automobile. He stopped 15 or 20 feet back from the tracks, at a point where he only got a view of west-bound trains no further than 180 feet. Trees and bushes on the property adjoining defendant's right of way cut off his sight of the track beyond that distance. He could see in the other direction a long way, and knew no train was following the freight. Morover, by stopping the automobile on the track which the freight had just passed over, he could see the east-bound track for upwards of 700 feet. The court, in holding that the driver of the aotomobile was guilty of contributory negligence, said end of opinion, p. 25:

> "The duty of an automobile driver approaching tracks where there is restricted vision to stop, look and listen, and to do so at a time and place where stopping and where looking and where listening will be effective is a positive duty, and these safe-guarding steps the plaintiff failed to take. He stopped where stopping served no purpose, and failed to stop where stopping would have disclosed danger. He made chance and not sight, the guarantee of his safety."

In Brommer v. Pennsylvania R. Co., 179 Fed. 577, there were obstacles to the vision up to 30 or 40 feet from the track, but at 30 feet there was a clear view down the track for at least 500 to 600 feet. The

court followed the Maidment case, just cited, in holding that the driver of the automobile was guilty of contributory negligence.

We call particular attention to what is said in the Maidment case and approved in the Bommer case on the subject of the importance of the questions here involved to railroads throughout the country, particularly what is said at page 23 of the opinion in the Maidment case.

The holdings of this Circuit in these two cases were approved on review in the later cases of Payne v. Shotwell, 273 Fed. 806, and Ryan v. D. L. & W. R. Co., 8 Fed. (2nd) 138, although in each of those cases the court found that the facts were different from those which existed in the Maidment and Brommer cases. However, the facts in each of those cases, to-wit, in the Maidment and Brommer cases, approximate the facts in the Goodman case, which we are now asking you to review.

(d) Decision in the Sixth Circuit.

We wish to call attention again to what the Circuit Court of Appeals for the Sixth Circuit said in the Goodman case, the one now under review, on this question of conflict (10 Fed. Rep. (2) 58, 60). It will be remembered that after referring to some other cases, the court said:—

> "That decision and others, including Bradley v. Mo. Pac. R. Co., 288 Fed. 484, apply the rule more rigidly against the user of the high way than this court has been

> willing to do. We prefer to adhere to the interpretation of Lake Erie & W. R. Co. v. Schneider, 257 Fed. (6 C. C. A.) 675, and Beckham v. Hines, 279 Fed. (N C. C. A.) 241. The seemingly less liberal cases of Kallmerten v. Cowen, 111 Fed. (6 C. C. A.) 297; Shatto v. Erie R. Co. 121 Fed. 678, and Fluckey, et al. v. Southern Ry. Co., 242 Fed. 468, must be regarded as dealing with particular states of fact and not as conflicting with the later opinions of the court which allow—if not in terms, in the adaptation of the general rule — 'for modifying circumstances or for accidental diversion of the attention to which the most prudent and careful are sometimes subject'."

It is our contention that there should be no variation of degree in applying a principle of law, because a variation in the degree of the application tends to change the rule of law. If in one Circuit, because of the method of application of the principle, the traveler on the highway is guilty of contributory negligence in failing to see an approaching train where he had a clear view at a point twenty feet from the track, or failing to see the train because he failed to stop where a view was available twenty feet from the track, and in some other Circuit, because of the degree of the application of the rule, is not held guilty of contributory negligence, then there is not only a variation in the manner of application but a change in the rule itself. But why should there be a variation in the application of a rule in different Circuits, where

the facts are undisputed? Why should there by liberality in one Circuit and conservatism in another? Why should there be rigidity in one Circuit and flexibility in another? If the facts are undisputed, and a traveler is guilty of negligence who fails to see a train approaching when he has a view available at a point twenty feet from the track, then it should follow that he is guilty of negligence whether the accident happened in the Eighth Circut or in the Sixth Circuit, or wherever the accident may have occurred, in so far as the federal rule is concerned?

Moreover, a rigid as compared with a liberal application of the rule, in the language of the Sixth Circuit Court of Appeals, makes for a juster and more equitable distribution of the burden as between the railroad and the traveler on the highway. The language of the Third Circuit Court of Appeals in the Maidment case, 168 Federal, 21, 23, quoted above, as to the importance of the question so completely states our views that we respectfully again call it to the attention of the court. The rule as laid down by the Eighth, Fourth and Third Circuits does not put upon the traveler on the highway any undue burden, but on the contrary puts upon him obligations which can be easily fulfilled. It is our contention that the rules as there laid down should be declared to be the rules to be applied in the federal courts in cases of this sort.

In this connection, we call attention to the following quotation from the opinion in the case of

Brommer v. Pennsylvania R. Co., 179 Federal Reporter, 577, at 582:—

> "The law contributes to the rational enjoyment of the automobile, to the safety of its occupans, and to the welfare of the railroad traveling public, when, in these early cases, it holds the automobile drivers rigidly to the rule laid down in the Maidment case that:
>
> " 'The duty of an automobile driver approaching tracks where there is restricted vision to stop, look, and listen, and to do so at a time and place where stopping and where looking and where listening will be effective, is a positive duty'."

It is therefore respectfully submitted that the decision of the Circuit Court of Appeals for the Sixth Circuit and that of the District Court which tried the case are erroneous, and that the judgment should be reversed.

Respectfully Submitted,

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Byron B. Harlan,
Morison R. Waite,
and
William A. Eggers.
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 356.

THE BALTIMORE AND OHIO RAILROAD COMPANY, PETITIONER,

vs.

DORA GOODMAN, ADMINISTRATRIX OF THE ESTATE OF NATHAN GOODMAN, DECEASED, RESPONDENT.

SUPPLEMENTAL BRIEF ON BEHALF OF THE PETITIONER.

This brief is to be supplemental to the brief heretofore filed on behalf of the petitioners in support of its petition for a writ of certiorari.

Additional Citations Supporting Petitioner.

In our original brief in support of the petition for a writ of certiorari, we cited, on page 7, in the second division of points and authorities, the case of A. T. &

S. F. R. Co. *v.* McNulty, 285 Fed., 97. Since then, we find that a petition for a writ of certiorari was denied by this Court—262 U. S., 746. The McNulty case is a decision by the Eighth Circuit Court of Appeals. On page 101 of the opinion, the court calls attention to the available view, namely, that during the last seventy feet of approach to the crossing, the view was unobstructed, and the approaching train in plain view. We wish to quote at this point two passages from the opinion at page 101, omitting the numerous citations in support of each. These passages are as follows:

> "The only reasonable deduction that can be drawn from the evidence is that the driver and the plaintiff either did not look toward the approaching train at a place where a view could have been had a reasonable distance down the track, or, if either of them looked at such a place, no heed was given to the oncoming trains, until it was too late to avoid the accident and the conduct of the driver was negligence as a matter of law. * * * *
>
> "The act of looking towards the track at a point where the view was obstructed was not sufficient diligence for it is the settled rule that a traveler approaching a known railway crossing 'does not relieve himself of the imputation of negligence by looking where he cannot see, and omitting to look again where he could see, and avoid danger.' * * *"

In our original brief in support of the petition for a writ of certiorari, on page 7, in the second subdivision of points and authorities, we cited Parramore *et al. v.*

D. & R. G. R. Co., 5 Fed. (2), 912. In this case a writ of certiorari was denied by this Court; 269 U. S., 560 The decision below is by the Eighth Circuit Court of Appeals. We call attention to the last paragraph of the opinion, involving the question of presumption on the part of the decedent as to the exercise of due care on the approach to the crossing. The Eighth Circuit disposed of the point in the following language:

> "But the decision of this Court in Northern Pacific Ry. *v.* Spike practically has been overruled by the later decisions of this Court and the rule firmly established that this is only a prima facie presumption which in the absence of any physical facts or substantial testimony or evidence to the contrary disappears and ceases to have effect."

In Bergman *v.* Northern Pacific R. Co., 14 Fed. (2), 580 (C. C. A. 8), the court adhered to its previous rulings, and at the close of the opinion said:

> "It is a settled rule that one who drives his team or his automobile upon a railroad track at a highway crossing, in front of an approaching train, which he could have seen, had he looked, or could have heard, had he listened, is in law guilty of contributory negligence. Chicago, M. & St. P. R. Co. *v.* Bennett, 181 F., 799; 104 C. C. A., 309; Bradley *v.* Mo. Pac. R. Co. (C. C. A.), 288 F., 484. The evidence in the case indicates that there was nothing to have prevented the deceased from seeing the approaching train, had he exercised ordinary care."

In B. & M. R. Co. *v.* Daniel, 290 Fed., 916, a decision by the second circuit, the court followed the rule as laid down by the State courts of Vermont. The seventh paragraph of the syllabus, as given in the Reporter, reads as follows:

> "One who is about to cross a railroad track in Vermont must look and listen for an approaching train, and must stop to listen, if that is necessary to enable him to listen effectually, and if his vision is obstructed he must be specially vigilant as regards his hearing, and if circumstances are such that his hearing cannot be relied on he must look with especial care, and he must continue to look and listen as he approaches the track, until the last moment when the discovery of a train would avail for his protection."

The Decisions in Ohio Support the Petitioner.

In Ohio, the syllabus is prepared by the court and is deemed to be the decision of the court. For that reason, we quote the three paragraphs of the syllabus in the D. T. & I. R. Co. *v.* Rohrs, 114 Ohio State, 493, decided at the January Term, 1926:

> "It is the duty of a driver of a vehicle upon a public highway when approaching a grade crossing of a steam railroad to both look and listen for approaching trains and to do so at such time and place and in such manner as will make the looking and listening effective.
>
> "When such driver upon the highway has a clear and unobstructed view each way along a

straight railroad track when near to and before going upon such crossing, and fails, in broad daylight, to see an engine or train which is then very close to the highway, and so near thereto as that, if the driver of the vehicle goes ahead, a collision will be inevitable, such driver is guilty of negligence in going upon the crossing at that time and under those conditions.

"A driver of a vehicle upon a highway cannot recover damages for an injury received in a collision at a steam railroad crossing, even though he testifies that he looked and listened and neither saw nor heard anything approaching on the railroad track before going upon the crossing, when the only conclusion that can reasonably be reached upon the evidence is that there is no doubt that had he looked he must have seen the danger, that was immediately at hand, in time to avoid injury."

We also call attention to the opinion, at page 502, with particular relation to the question of presumption on the part of the decedent, and beg leave to quote from the opinion as follows:

"Surely it will not do for one to claim the right to recover simply because he has looked and did not see, if the conditions are such that, had he looked, he must have seen. When he says he did look, and the conditions establish the fact that any one who looked would have seen, then, if he says he did not see, his own evidence establishes the fact that he did not look, though he may think he did. To hold otherwise would simply be a manifest absurdity, and the doctrine that the traveler in a vehicle upon the high-

way when coming to a railroad grade crossing must look and listen might as well be abandoned if one so placed, in broad daylight, can say that he looked in a given direction where there was a locomotive moving toward the crossing, and not farther than 75 feet away, and that he could not see it. It would only be a trifle more absurd for a traveler on a highway to drive into the side of a train that was crossing the highway, and then seek to recover on the ground that signals had not been given, and that he looked straight ahead to see if there was any obstruction, and also looked to the right and to the left on the crossing, and he did not see any when he was within 20 feet of the crossing, and so he drove on into the side of the moving train, with serious injuries resulting to himself and his automobile. If he may look to the right with an engine within 75 feet of him and not see it, why should he not be permitted to recover if the train was standing on or moving across the highway right in front of him and he did not see that? Where the trial court is requested to charge that it is the duty of a traveler upon the highway to look and listen before going upon a steam railway grade crossing, it is error for the court to refuse to so charge, and in lieu thereof to charge the jury only that the traveler on the highway must exercise ordinary care for his own safety before going upon a steam railroad crossing. The duty is definite, and is that he must look as well as listen, and that he must look from a point and at a time that will make the looking effective to apprise him whether danger is near or not."

In a later decision—Toledo Terminal R. Co. *v.* Hughes, 115 Ohio State, 380, not yet officially reported, but found in the Ohio Law Bulletin and Reporter for February 21, 1927, and in 154 Northeastern Reporter, at page 916, the first paragraph of the syllabus, as prepared by the court, reads as follows:

> "A traveler approaching a railroad crossing at which he knows an automatic signal is maintained, while entitled to place some reliance upon the indication of safety which silence of the signal implies, is nevertheless bound to use such care in addition as an ordinarily prudent man would use under such circumstances."

These are the two most recent decisions of the Supreme Court of Ohio on the question, and it is our contention that they sustain fully our position in the present case.

The Public Importance of the Question Favors a Strict Obligation Against the Traveler on the Highway.

We do not believe we can emphasize too much the importance of the question here involved, both to the Railroad Companies and also to the travelers on the highways.

According to Accident Bulletin No. 93, page 115, issued by the Interstate Commerce Commission, there were in the year 1924 almost 250,000 crossings at grade with streets, avenues and highways. For the same year there were registered in the various States 17,500,000

automobiles, which in 1925 had increased to almost 20,000,000. The figures respecting registration have been obtained from the National Automobile Chamber of Commerce.

The fatalities at railroad crossings involving automobiles during the year 1924 constituted almost 10 per cent of all the fatalities involving automobiles in the United States, or a total of 1,784.

It is obvious that the number of automobiles increases. Moreover, with the growth of cities and towns, the number of highway crossings over railroads likewise increases, and this increase, in the nature of things, will be faster than the elimination of crossings at grade. The cost of elimination is very high, and in many instances the engineering difficulties are almost insurmountable. As to the cost, we respectfully call attention to the decision of this Court in Erie Railroad Company *v.* Board of Public Commissioners *et al.*, 254 U. S., 394. Similar illustrations as to cost and engineering difficulties can in fact be multiplied by the number of large cities throughout the United States.

Conclusion.

In closing we again call attention to what was said by the court in the Maidment case, 168 Fed., 21, 23, as follows:

> "With the coming into use of the automobile, new questions as to reciprocal rights and duties of the public and that vehicle have and will con-

> tinue to arise. At no place are those relations more important than at the grade crossings of railroads."

That case arose in 1909. As we said in our original brief, those words had a prophetic sound. The problems which they suggested would arise are now before the public, and one of them is involved in this case. We respectfully suggest that the solution of that problem and of this case is that contained in the opinion in the case of Brommer *v.* Pennsylvania R. Co., 179 Fed., 577, where, at page 582, at the bottom, it is said:

> "The law contributes to the rational enjoyment of the automobile, to the safety of its occupants, and to the welfare of the railroad traveling public, when, in these early cases, it holds the automobile drivers rigidly to the rule laid down in the Maidment case that:
>
> " 'The duty of an automobile driver approaching tracks where there is restricted vision to stop, look, and listen, and to do so at a time and place where stopping and where looking and where listening will be effective, is a positive duty.' "

Respectfully submitted,

A. McL. MARSHALL,
BYRON B. HARLAN,
MORISON R. WAITE, AND
WILLIAM A. EGGERS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 58

THE BALTIMORE AND OHIO RAILROAD COMPANY, PETITIONER,

vs.

DORA GOODMAN, ADMINISTRATRIX OF THE ESTATE OF NATHAN GOODMAN, DECEASED, RESPONDENT.

SECOND SUPPLEMENTAL BRIEF ON BEHALF OF THE PETITIONER.

I.

This is an additional brief in support of the petitioner, and is the second supplemental brief filed in this case.

II.

Some Additional Federal Cases.

For the purpose of further indicating the conflict in the views of the circuit courts of appeal, we respect-

fully call attention, first, to Jensen *vs.* Chicago, St. P., M. & O. Ry. Co., 12 Federal (2), 413, an opinion by the court in the Eighth Circuit. Here the driver of the automobile made observations at various points as he approached the crossing, beginning at a point 300 feet from the crossing. He was aware of the approach of the train, but decided to try to get over before the train, with the result that the engine of the automobile stalled on the crossing. Near the close of the opinion the court says:

> "So often has this Court announced the doctrine that a person who drives his team, automobile, or truck upon a railroad track at a highway crossing in front of a fast-approaching train which he sees approaching in such proximity as to be notice to him of the danger, or if he does not see the train but could have ascertained its approach by exercising his faculties of sight and hearing at such a place and within such distance of the crossing as would be effective and does not do so, he is guilty of contributory negligence as a matter of law, that it seems a work of superoragation to again cite the cases. However, see Pyle *v.* Clark *et al.*, 79 F., 744, 25 C. C. A., 190; Davis *v.* Chicago, R. I. & P. Ry. Co., 159 F., 10, 88 C. C. A., 488, 16 L. R. A. (N. S.), 424; Chicago Great Western R. Co. *v.* Biwer (C. C. A.), 266 F., 965; Bradley *v.* Missouri Pac. R. Co. (C. C. A.), 288 F., 484; Wabash Ry. Co. *v.* Huelsmann (C. C. A.), 290 F., 165; Gordon Fireproof Warehouse & Van Co. *v.* Hines (C. C. A.), 272 F., 604; Illinois Cent. R. Co. *v.* Ackerman, 144 F., 959, 76 C. C. A., 13; Coverdale *v.* Sioux City Service Co. (C. C. A.),

268 F., 963; St. Louis & S. F. R. Co. *v.* Summers *et al.*, 173 F., 358; 97 C. C. A., 328; Atchison, T. & S. F. Ry. Co. *v.* McNulty (C. C. A.), 285 F., 97; Parramore *et al. v.* Denver & R. G. W. R. Co. (C. C. A.), 5 F. (2d), 912."

As contrasted to the foregoing, we call attention to Atlantic City R. Co. *v.* Smith and Atlantic City R. Co. *v.* Young, two cases considered together, reported in the same volume, 12 Fed. (2), at page 658, an opinion by the Circuit Court of Appeals for the Third Circuit. In these cases the truck was stopped at a distance of 20 feet from the crossing, and the two on the truck looked in both directions, with an unobstructed view from the direction in which the train approached of 780 feet. Under these circumstances, it was held to be a question for the jury whether the two on the automobile were at fault in failing to look again or in failing to see what could have been seen under the circumstances.

In A., T. & S. F. R. Co. *v.* Spencer *et al.*, 20 Federal (2d), 714, Circuit Court of Appeals, Ninth Circuit, decided August 1, 1927, a seventeen-year-old boy was pushing a stubborn automobile truck over a grade across a railroad track, admitting that he did not look because he was intent upon his work. The view to the east, whence the train came, was 850 feet through a cut. For what distance back from the track the view was available the opinion does not disclose. The court reversed and remanded the judgment in favor of the plaintiff, setting forth the law as to the duty of the traveler on the highway in a paragraph found at the

top, in the second column of the reporter, at page 716, and reading as follows:

> "(1) As pertinent to the undisputed facts, the well-established rule is that one who is about to drive a motor car or truck over a railroad track at an unguarded crossing always has the obligation upon him vigilantly to use his faculties of sight and hearing. The driver must look to see whether a train is approaching. If, for any reason, his view of the track is obstructed, his duty is to listen. If, perchance, the engine of his automobile is making any noise, or if there is noise or confusion due to any cause which interferes with his hearing, it is his duty to take the precaution of stopping and listening. If the track is a single one, he should be vigilant to look in both directions before attempting to cross."

III.

Some Additional Authorities in Ohio.

In C. C. C. & St. L. R. Co. *v.* Lee, 111 Ohio St., 391, there were some obstructions to the view by reason of boughs and leaves from trees overhanging the right of way. The latter was 100 feet wide. However, for at least 40 feet, as the crossing was approached from the angle involved in the Lee case, there was a view of at least a quarter to a half mile. It was held that under these circumstances the driver of the automobile was negligent in failing to make observations which were available and which would have enabled him to see the approaching train.

Since the first supplemental brief was filed, Toledo Terminal R. Co. *v.* Hughes, 115 Ohio St., 562, has been officially reported. We call attention to the stress laid by the court in its opinion at page 569, on Pennsylvania R. Co. *v.* Morel, 40 Ohio State, 338, quoting from that case as follows:

> "The fact that the view was obstructed did not excuse his neglect to stop and listen; it made his neglect to do so greater. We think the evidence clearly proved him guilty of contributory negligence."

We also take the liberty of quoting in full an enactment of the Legislature of Ohio, approved April 18, 1927, 112 Ohio Laws, 126, known as House Bill 115, reading as follows:

(House Bill No. 115.)

AN ACT

To require drivers of vehicles transporting explosives or inflammable substances to bring such vehicles to a stop before crossing steam or interurban railroad tracks.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 12533—*Vehicles transporting explosives to stop before crossing railroad tracks.*

SECTION 1. All drivers of horse drawn or motor propelled vehicles transporting explosives as defined in Section 5903-1 of the general code, or transporting ether, carbon bisulphide, naph-

tha, benzols, collodion, hydrocarbon (gas drips), liquefied petroleum gas, acetone, alcohol, amyl acetate, toluol, amyl alcohol, turpentine, fuel oil, wet nitro cellulose, wet nitro starch, wet picric acid, wet calcium carbide, pyroxylin plastic, or other like volatile combustibles or inflammable substances, or transporting more than ten gallons of gasoline or kerosene or other motor vehicle fuel for any purpose other than supplying power to such vehicles, shall bring such vehicles to a full stop before crossing the track or tracks of any steam or electric interurban railroad, such stop to be made not more than fifty (50) feet and not less than ten (10) feet from the nearest rail of the crossing, and at a point where the clearest view of approaching trains, locomotives or cars can be had.

SECTION 12533-1—*Penalty for violation:*

SECTION 2. Whoever fails to comply with or violates any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars, nor more than one hundred dollars, or imprisoned in the jail or workhouse not less than thirty days nor more than six months.

We call attention to the last part of Section 1. We submit that this indicates the opinion of the Ohio Legislature as to the action of the driver of the kind of vehicles toward which the statute is directed, namely, that a driver must stop such vehicle not only within the limits of 10 and 50 feet respectively from the nearest rail, but that the stopping within those distances

Summary No. 24.—Highway Grade-crossing Accidents, Showing, by States, Total Casualties and A
Train and train-service casualties at
Casualties resulting from accidents in whi

	Number of accidents	Per cent of casualties in highway grade-crossing accidents	Total persons		Number of accidents	Per cent of casualties in accidents involving automobiles	T
			Killed	Injured			K
Total...	5,479	100.00	2,206	6,555	4,576	100.00	1

ACCIDENT BULLETIN No. 94

Summary No. 24.—Highway Grade-crossing Accidents, Showing, by States, Total Casualties and Accidents in Which Automobiles were Involved for the Year Ended December 31, 1925

	Train and train-service casualties at highway grade crossings				Casualties resulting from accidents in which automobiles were involved								
	Number of accidents	Per cent of casualties in highway grade-crossing accidents	Total persons		Number of accidents	Per cent of casualties in accidents involving automobiles	Total persons		Number of automobiles registered	Casualties per 10,000 automobiles registered		Highway grade-crossings, Class I carriers	
			Killed	Injured			Killed	Injured		Killed	Injured	Protected	Unprotected
Total...	5,479	100.00	2,206	6,555	4,576	100.00	1,784	5,916	19,954,347	.89	2.96	27,161	205,594

must be at the point where he has the clearest view of an approaching train.

IV.

Additional Figures from the Interstate Commerce Commission Relative to the Importance of the Questions Involved.

Since our other briefs were filed Accident Bulletin No. 94 of the Interstate Commerce Commission for the calendar year 1925 has become available. We take the liberty of quoting some figures from this report to show the importance of the questions involved, not only to the railroad, but to the public at large.

On page 25 of this bulletin appears Summary No. 24, which we copy in full, except that we have omitted the details of each of the States and the District of Columbia. The figures as to the number of automobiles registered were furnished to the Interstate Commerce Commission by the Bureau of Public Roads, U. S. Department of Agriculture.*

(Here follows Summary No. 24, Accident Bulletin No. 94.)

*NOTE.—Class 1 railroads referred to in the tables are those with an annual revenue of $1,000,000 or more.

It scarcely needs comment to show that the situation as typified by these figures is a serious one.

Summary No. 25, on the same page, among other things, gives the number of crossings of railways with highways. As limited to such crossings, it reads:

ACCIDENT BULLETIN No. 94

Summary No. 25.—Grade Crossings of Class I Carriers, 1925

B. Railway with highway

Number of crossings with highways

	At beginning of year	Added during year	Eliminated during year	At end of year
Total.....	232,710	8,688	7,765	233,633

From this it will be observed that, notwithstanding the elimination of 7,765 existing crossings, there were added during the year new crossings numbering 8,688. In other words, the new crossings due to the construction of new highways or to the construction of new railroad lines over highways increase faster than the crossings where the grade is eliminated.

Table No. 50, on page 26 of Accident Bulletin No. 94, shows that the mere protection of a crossing by gates or watchmen, lights or bell, or a combination, does not forestall the possibility of accidents occurring, and that these accidents occur not alone by reason of the train striking the automobile, but also because of the automobile running into the side of a train. As limited to such accidents, Table No. 50 reads as follows:

(Here follows Table No. 50, Analysis of Casualties etc.)

Table No. 50. Analysis of C

Kind of protection	Total			Pedestrians		
	Number of accidents	Persons		Number of accidents	Persons	
		Killed	Injured		Killed	Injur
Closed crossing gates	176	101	109	136	74	
Crossing watchman	407	127	537	67	37	
Audible and visible signal	98	67	91	5	5	
Audible signal	334	176	359	22	14	
Visible signal	173	85	198	14	10	
Other warning signal	.....	.....	.....	.....	.....	
Unprotected	3,051	1,349	3,654	250	152	
Total	4,239	1,905	4,948	494	292	
Closed crossing gates	29	11	26	1	1	
Crossing watchman	89	12	149	2	.....	
Audible and visible signal	21	7	35	.....	.....	
Audible signal	78	22	112	.....	.....	
Visible signal	53	21	55	1	.....	
Other warning signal	.....	.....	.....	.....	.....	
Unprotected	729	129	1,053	12	1	
Total	999	202	1,430	16	2	

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CARD 3

alysis of Casualties in Highway Grade-crossing Accidents, Showing Kind of Protection Afforded at Crossing at the Time of Accident, for the Year Ended December 31, 1925

trians		Passenger automobiles			Auto-buses			Auto-trucks			Motorcycles or bicycles			Trolley cars			Animal-drawn vehicles			Other vehicles or machines		
Persons		Number of accidents	Persons		Number of accidents	Persons		Number of accidents	Persons		Number of accidents	Persons		Number of accidents	Persons		Number of accidents	Persons		Number of accidents	Persons	
lled	Injured		Killed	Injured		Killed	Injured		Killed	Injured		Killed	Injured		Killed	Injured		Killed	Injured		Killed	Injured
		Struck by train																				
74	68	35	22	36	.....	.....	.....	2	2	4	2	2	.....	.....	.....	.....	1	1	1	.....	.....	.....
37	34	266	76	400	3	.....	9	49	11	55	.....	.....	.....	7	.....	26	14	3	12	1	.....	1
5	.....	70	53	69	.....	.....	.....	19	6	21	1	.....	1	.....	.....	.....	3	3	.....	.....	.....	.....
14	8	229	129	274	3	1	6	70	28	64	1	.....	1	1	.....	6	9	4	6	.....	.....	.....
10	4	121	60	151	.....	.....	.....	29	11	31	1	.....	1	.....	.....	.....	7	4	5	.....	.....	.....
..	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
52	108	2,084	998	2,700	16	11	71	533	134	584	11	5	6	9	2	53	142	45	125	6	2	7
92	222	2,805	1,338	3,630	22	12	86	702	192	759	16	7	9	17	2	85	176	60	149	7	2	8
		Ran into side of train																				
1	.....	24	9	22	.....	.....	.....	3	1	3	1	.....	1	.....	.....	.....	.....	.....	.....	.....	.....	.....
..	2	77	12	115	1	.....	1	7	.....	9	.....	.....	.....	2	.....	22	.....	.....	.....	.....	.....	.....
..	.....	19	7	31	.....	.....	.....	2	.....	4	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
..	.....	71	20	103	.....	.....	.....	6	2	7	1	.....	2	.....	.....	.....	.....	.....	.....	.....	.....	.....
..	1	46	18	50	.....	.....	.....	2	.....	2	4	3	2	.....	.....	.....	.....	.....	.....	.....	.....	.....
..	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1	11	630	109	927	3	.....	9	66	14	90	10	3	8	2	.....	2	6	2	6	.....	.....	.....
2	14	867	175	1,248	4	.....	10	86	17	115	16	6	13	4	.....	24	6	2	6	.....	.....	.....

V.

Conclusion.

We respectfully submit, therefore, that this Court should hold the law to be that the traveler on the highway must use his faculties of seeing and hearing, and, if necessary to make his looking and listening effective, that his vehicle should be stopped, and that he should be held to see that which could have been seen had he looked at the place where looking was effective.

Respectfully submitted,

THE BALTIMORE AND OHIO
RAILROAD COMPANY,
By MORISON R. WAITE,
BYRON B. HARLAN,
A. McL. MARSHALL,
WILLIAM A. EGGERS,
Counsel for Petitioner.

(7892)

MAY 17 1926

No. [redacted]

Supreme Court of the United States

OCTOBER TERM—1925

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Petitioner,

vs

DORA GOODMAN, as Administratrix of the Estate of Nathan Goodman, deceased,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

MATTERN, BRUMBAUGH & MATTERN,
I. L. JACOBSON,
Attorneys for Respondent.

COURT INDEX PRESS, 616-30 MAIN, CINCINNATI : : MAY, 1926

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Supreme Court of the United States

OCTOBER TERM—1925

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

No. 1161 *vs*

DORA GOODMAN, as Administratrix of the Estate of Nathan Goodman, deceased,
Respondent.

Brief in Opposition to Petition for a Writ of Certiorari.

---

1. NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS.

A reading of the petitioner's brief in support of its petition for a writ of certiorari shows clearly that there is nothing so unusual about this case as to warrant this court to review it; nor is there any conflict between the various Circuit Courts of Appeal upon the law of this case as claimed by petitioner.

The Circuit Court of Appeals of the Sixth Circuit specifically recognizes the same law as to contributory negligence as does every other circuit in the United States, and, as does every other circuit, it recognizes the fact that no two cases are exactly alike and that the application of the law of contributory negligence to a case must depend upon the facts of each instant case.

In so doing, the Circuit Court of Appeals for the Sixth Circuit is adhering to the rule laid down by the Supreme Court of the United States in the case of *Flannelly* v. *Delaware and Hudson Railroad Company*, 255 U. S. 597-603, in which case Mr. Justice Van Devanter states the rule thus:

> "The law requires of one going upon or over a railroad crossing the exercise of such care for his own protection as reasonably prudent person ordinarily would take in the same or like circumstances, including the use of his faculties of sight and hearing. And, generally speaking, whether such care has been exercised is a question of fact for the jury, especially if the evidence be conflicting or such that different inferences reasonably may be drawn from it."

This case was decided in 1912 and so clearly lays down the rule for negligence cases that we fail to see the necessity of this court speaking again upon the subject. So emphatically has this court spoken in the Flannelly case, that we cannot see the necessity for further emphasis upon the subject. And furthermore we contend that all of the cases cited by the petitioner recognize and apply the Flannelly

doctrine to the facts of each case as presented and we challenge counsel for petitioner to show wherein any Circuit Court of Appeals has ever failed or refused to follow the Flannelly case.

2. Facts of this Case.

The facts in this case as found by the lower court fully justified the application of the Flannelly rule. The train of the Baltimore & Ohio Railroad Company, the petitioner, was traveling southwestwardly at sixty (60) miles per hour according to the admission of the petitioner's engineer, whereas the circumstances fully warrant the belief that its true speed was nearer seventy-five (75) miles per hour. The accident occurred in an unincorporated village. The decedent, traveling due east, had no practical view past the obstructing section house which was two hundred forty-three (243) feet north of the crossing until he was about 20 feet from the first rail, according to witnesses. It would follow that he was within twelve (12) feet from danger at that time, considering the evidence that the driver sits six (6) feet back from the front of the machine and that the overhang of the railroad engine is two and one-half ($2\frac{1}{2}$) feet. At that time, the engine was still obscured by the section house because, according to the engineer:

> "I first saw the truck after I had passed the section men's tool house. I did not see anything of the truck until it was right up to the rail."

and its speed was so great that before the decedent

could save himself the train boomed down upon him from behind the section house.

Thus it will be seen that Goodman, traveling at six (6) miles per hour had about two (2) seconds interval to guide his conduct. Hearing no signal, no bell nor any other warning, he approached the track. And now the Railway Company seeks to hold him guilty of contributory negligence as a matter of law upon what he could or could not do in two (2) seconds. To merely state the proposition is to answer it.

3. The Law as Applicable to this Case.

Similar situations were considered in the case of *Beckham* v. *Hines*, 279 Fed., 241-243.

> "The trial court laid some stress upon the proposition that when the decedent was within 16 or 17 feet of the track, he could have seen the approaching train and that it was then not too late to avoid collision. We think it was error to so decide as a matter of law. When decedent was within 16 feet of the track, the front of the automobile would have been nearer than that; indeed, if the automobile was not visible to the engineer until within 75 feet of the point of collision, to traverse his 75 feet by a train running 45 miles per hour (66 feet per second) required but about 1-1/7 seconds of time. That he did not approach the track at a rapid rate of speed is shown by the testimony that his automobile was found after the collision to be in low gear, which would prevent it running more than 10 miles an

hour. Moreover the ruling excluded the not impossible inference that the train's sudden appearance created an emergency calling for such action as in that emergency seemed most prudent. It was clearly within the jury's province to find that the decedent was in the exercise of due care in making the crossing."

Also in the case of *Wise* v. *D. L. & W.*, 81 N. J. L., 397.

"Having his view opened to the right a little sooner than a clear view could be had to the left, the plaintiff naturally looked to the right side first; that as his view widened, and as his vision extended farther and farther along the track, he gazed in that direction—towards what he calls the 'danger point'—so fixedly and attentively that he consumed the brief space of time available. In short before he had finished his observations to the right, and while he was still looking in that direction, the horse had got so near to the track that when plaintiff's attention was directed to the oncoming engine it was too late to stop the horse. Does a collision occurring under such circumstances import negligence on the part of the traveler so clearly that reasonable and fairminded jurymen may not differ about it? We think not, by any means.

"The space was very narrow and at the time brief. According to the surveyor's measurement the enbankment falls away on the right at a point 43 feet from the center of the track. Reducing this by one-half the width of the track, plus the over-

hang of the locomotive, plus the distance from the driver to the horse's head, leaves probably 25 feet or a little more to be traversed. But this must be still further reduced, first, because the traveler does not begin to avail himself of the benefit of it, until he has proceeded some little distance beyond the obstruction; and, secondly, some considerable space is required in which to check the momentum of the horse.

"But when the evidence shows (or so the jury migh find) that he employed every moment after passing the obstructions in looking and listening for danger upon the rail, it cannot be said as matter of law that he was guilty of contributory negligence because he looked in one direction rather than the other, when it may well be said he had not time to properly examine the track in both directions."

And in the case of *L. E. Ry.* v. *Summers*, 125 Fed., 719, certiorari denied, 192 U. S., 607.

"And the jury might also have thought that the degree of caution which they were bound to exercise was in some measure affected by the supposition that the railroad would observe its duty in that locality of blowing the whistle or ringing the bell of the engine in running through the town. We do not mean to say that such a supposition may be absolutely relied upon as an excuse for not taking due precaution, but it would seem to be an element to be taken into account in considering the reasonableness of the conduct of the decedent, and that the railroad company ought not to complain thereof."

Also in the case of *Grand Trunk Ry.* v. *Ives*, 144 U. S., 408-433:

> "It is also insisted that the court erred in refusing the following request of the defendant for instructions:
>
> "If you find that the deceased might have stopped at a point 15 or 18 feet from the railroad crossing and there had an unobstructed view of defendant's track either way; that he failed so to stop; that instead the deceased drove upon the defendant's track watching the Bay City train that had already passed and with his back turned toward the approaching train, the deceased was guilty of contributing to the injury and your verdict must be for the defendant, although you are also satisfied that the defendant was guilty of negligence in the running of the train in the particulars mentioned in the declarations.
>
> "The reason given by the court for refusing this request was that 'It is too much upon the weight of the evidence and confines the jury to the particular circumstances narrated without notice of others that they may think important'. This reason is a sound one. In determining whether the deceased was guilty of contributory negligence the jury were bound to consider all the facts and circumstances bearing upon the question, and not select one particular prominent fact or circumstance as controlling the case to the exclusion of all others."

4. The True Meaning of Railroad Company's Argument.

The true meaning of the rule contended for by the petitioner is well expressed by the trial judge thus:

> "In effect, the contention of the defendant goes to the extent of urging that in no case of a daylight automobile crossing accident, in which a view of the track can be had even though but a short distance from the rails, can there be a recovery."

We cannot believe that such is the law in *any* Circuit of the United States. The words of the Second Circuit Court of Appeals, in *D. L. & W. Ry.* v. *Rebman*, 285 Fed., 317, quoting with approval from *Smith* v. *N. Y. C. Ry.*, 177 N. Y., 224, seem to apply most fittingly to the case at bar.

> "The so-called crossing cases are proverbially troublesome for there are comparatively few instances in which the facts and circumstances considered in connection with the oral testimony will lead so unerringly to a single conclusion as to permit the courts to hold, as a matter of law, that contributory negligence has been established."

The petitioner is asking this court to fix a standard in law by which a court is enabled to arbitrarily say in every case of a day light automobile crossing accident in which any view of the track can be had, even though a short distance from the rails, what conduct shall be considered reasonable and prudent

on the part of the driver of the automobile under any and all circumstances. This court in *The Grand Trunk Railway Company of Canada* v. *Albert Ives, Administrator*, 144 U. S., at page 417, states that there is no such "fixed standard". The court says:

> "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care under any and all circumstances."

The impossibility of fixing such a rule today is as apparent as it was when the Supreme Court spoke in the Ives Case.

5. Concluding Argument.

The earliest enunciation of the rule to govern this class of cases was in the case of the *Continental Improvement Company* v. *Stead*, 99 U. S., 161-165, in which Mr. Justice Bradley took occasion to remark that:

> "We think the Judge was perfectly right, therefore, in holding that the obligations, rights and duties of railroad and travelers upon intersecting highways are mutual and reciprocal, and that no greater degree of care is required of the one than of the other. For, conceding that the railway train has the right of procedence of crossing, the parties are still on equal terms as to the exercise of care and diligence in regard to their relative duties. The right of precedence referred to does not impose upon the wagon the whole duty

> of avoiding a collision. The duty of the wagon to yield precedence is based upon this condition. Both parties are charged with the mutual duty of keeping a careful lookout for danger; and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty."

An examination of the cases cited by petitioner show that each and every one of them were decided under the peculiar facts thereof just as the case at bar was decided under the peculiar facts of this case. We firmly believe that the facts in the cases cited by the petitioner showed that the injured party was so clearly guilty of contributory negligence, that every Circuit Court of Appeals would so have held in those particular cases.

The attitude of the petitioner is well expressed in the closing words of Mr. Justice Bradley in *Continental Improvement Company* v. *Stead, supra:*

> "the mistake of defendant's counsel consists in seeking to impose upon the wagon too exclusively the duty of avoiding the collision and to relieve the train too entirely from responsibility in the matter."

Respectfully submitted,

MATTERN, BRUMBAUGH & MATTERN,
I. L. JACOBSON,
Attorneys for Respondent.

Lee Warren James

OCT 28 1927
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term—192[illegible]

No 58

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

DORA GOODMAN, as Administratrix of the Estate of NATHAN GOODMAN, deceased,
Respondent.

Brief for Respondent

R. N. Brumbaugh,
I. L. Jacobson,
Attorneys for Respondent.
Dayton, Ohio.

COURT INDEX PRESS, 440-442 MAIN ST. 25 OCTOBER, 192[illegible]

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Supreme Court of the United States

October Term—1926.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Petitioner,

No. 356. vs.

DORA GOODMAN, as Administratrix of the Estate of NATHAN GOODMAN, deceased,

Respondent.

Brief for Respondent

---

1. FACTS OF THIS CASE.

We believe that the following statement taken *verbatim* from the opinion of the Circuit Court of Appeals is a full and fair statement of the important and controlling facts in this case:

> This is a action for damages for the death Nathan Goodman resulting from the collision of a truck with a railroad train at a grade crossing in an unincorporated village in Montgomery County, Ohio. The collision occurred in the day time. The truck was moving eastwardly on the public highway and the train was running

in a southwesterly direction. Plaintiff's evidence tended to show that deceased reduced the speed of the truck when about forty feet from the crossing from ten to twelve miles an hour to five or six miles, at which rate he was moving at the time of the collision; that the view of the tracks north of crossing as one approached it from the west was obscured by buildings and other obstructions; that there was a tool shed on the right of way two hundred and forty-three feet north of the crossing, and twenty-four feet from the west track there was a store which obstructed the line of vision to the north; that deceased could not have seen the aproaching train until he was within twenty-four feet of the west rail of the west track and even then could not have seen it beyond the tool shed; and according to calculations put in evidence he had practically no view to the north, from his position on the truck, until the front of it was less than twenty feet from the west rail. There was a dispute in the evidence as to whether adequate signals of the train's approach to the crossing were given. The court submitted to the jury the issues of negligence and contributory negligence and a verdict was returned in favor of plaintiff, upon which judgment was rendered.

The main contention here is that the trial court erred in refusing to direct the jury to return a verdict for defendant. It is not denied that the train was running at the rate of about sixty miles an hour, and Goodman was moving, immediately before the collision, at the rate of five or six miles an hour; consequently, when Goodman was eighteen feet west of the track the engineer was approximately two hundred and sixteen feet north of the crossing, each in view of the other. The engineer said he was maintaining a lookout the width of the right of way

> but did not see the truck until the moment of collision. It was not shown that Goodman looked or listened for the train, but there is a rebuttable presumption that he did both. *Beckman* v. *Hines, Agent* (6 C. C. A.), 279 Fed. 241. Plaintiff accounts for the engineer's failure to see the truck when it emerged from behind the store on the theory that the tool house obstructed his line of vision, which shows, as she contends, that the train was running faster than sixty miles an hour. That may or may not be true, or it may be though there was a momentary diversion of attention, as a glance in another direction would have sufficed to prevent effective action and perhaps discovery in the brief time that elapsed before the two vehicles came in contact at the crossing—as to Goodman, for example, the looking to the South before looking to the north.

As shown above, the Court of Appeals found that the decedent could not see north of the tool shed until the front of his truck was less than 20 feet from the west rail. The evidence was uncontradicted that the seat in which the decedent as the driver of the truck was sitting was six feet back from the front of the machine, and that the overhang of the railroad engine was two and one-half (2½) feet. Therefore it follows that the front of his truck was within 11½ feet from the danger point, before Goodman could first see past the tool shed, behind which was the approaching train. Goodman traveling at five to six miles per hour was covering according to mathematical calculations, seven to eight feet per second. Therefore he had only one and one-half seconds interval to guide his conduct. Hearing no signal, no bell nor any other warning, he had been led into a trap. And now the Railway Com-

pany seeks to hold him guilty of contributory negligence AS A MATTER OF LAW upon what he could or could not do in one and one-half seconds. To merely state the proposition is to answer it.

The Court of Appeals in its opinion above quoted made mention of the fact that "when Goodman was eighteen feet west of the track the engineer was approximately two hundred and sixteen feet north of the crossing, each in view of the other." The Court of Appeals therefore took into consideration that when Goodman in his position was eighteen feet from the track, the front of his machine was nine and one-half (9½) feet from the danger point, and at five to six miles per hour, he would cover that distance in ONE second. We feel that therefore the Court of Appeals was completely justified in refusing to hold Goodman guilty of contributory negligence AS A MATTER OF LAW, in what he could or could not do in one seconds' time.

2. THE LAW AS APPLICABLE TO THIS CASE.

In the case of *Flannelly* v. *Delaware and Hudson Railroad Company,* 255 U. S. 597-603, Mr. Justice Van Devanter states the rule thus:

> "The law requires of one going upon or over a railroad crossing the exercise of such care for his own protection as reasonably prudent person ordinarily would take in the same or like circumstances, including the use of his faculties of sight and hearing. And, generally speaking, whether such care has been exercised is a question of fact for the jury, especially if the evidence be conflicting or such that different inferences reasonably may be drawn from it."

This case was decided in 1912 and clearly lays down the rule for negligence cases.

Similar situations were considered in the case of *Beckman* v. *Hines,* 279 Fed., 241-243.

> "The trial court laid some stress upon the proposition that when the decedent was within 16 or 17 feet of the track, he could have seen the approaching train and that it was then not too late to avoid collision. We think it was error to so decide as a matter of law. When decedent was within 16 feet of the track, the front of the automobile would have been nearer than that; indeed, if the automobile was not visible to the engineer until within 75 feet of the point of collision, to traverse his 75 feet by a train running 45 miles per hour (66 feet per second) required but about 1-1/7 seconds of time. That he did not approach the track at a rapid rate of speed is shown by the testimony that his automobile was found after the collision to be in low gear, which would prevent it running more than 10 miles an hour. Moreover the ruling excluded the not impossible inference that the train's sudden appearance created an emergency calling for such action as in that emergency seemed most prudent. It was clearly within the jury's province to find that the decedent was in the exercise of due care in making the crossing."

Also in the case of *Wise* v. *D. L. & W.,* 81 N. J. L., 397.

> "Having his view opened to the right a little sooner than a clear view could be had to the left, the plaintiff naturally looked to the right side first; that as his view widened, and as his vision extended farther and farther along the track, he gazed in that direction—toward what

he calls the 'danger point'—so fixedly and attentively that he consumed the brief space of time available. In short before he had finished his observations to the right, and while he was still looking in that direction, the horse had got so near to the track that when plaintiff's attention was directed to the oncoming engine it was too late to stop the horse. Does a collision occurring under such circumstances import negligence on the part of the traveler so clearly that reasonable and fair-minded jurymen may not differ about it? We think not, by any means.

"The space was very narrow and the time brief. According to the surveyor's measurement the embankment falls away on the right at a point 43 feet from the center of the track. Reducing this by one-half the width of the track, plus the overhang of the locomotive, plus the distance from the driver to the horse's head, leaves probaly 25 feet or a little more to be traversed. But this must be still further reduced, first, because the traveler does not begin to avail himself of the benefit of it, until he has proceeded some little distance beyond the obstruction; and, secondly, some considerable space is required in which to check the momentum of the horse.

"But when the evidence shows (or so the jury might find) that he employed every moment after passing the obstructions in looking and listening for danger upon the rail, it cannot be said as matter of law that he was guilty of contributory negligence because he looked in one direction rather than the other, when it may well be said he had not time to properly examine the track in both directions."

And in the case of *L. E. Ry.* v. *Summers*, 125 Fed., 719, certiorari denied, 192 U. S. 607.

"And the jury might also have thought that the degree of caution which they were bound to exercise was in some measure affected by the supposition that the railroad would observe its duty in that locality of blowing the whistle or ringing the bell of the engine in running throught the town. We do not mean to say that such a supposition may be absolutely relied upon as an excuse for not taking due precaution, but it would seem to be an element to be taken into account in considering the reasonableness of the conduct of the decedent, and that the railroad company ought not to complain thereof."

Also in the case of *Grand Trunk Ry.* v. *Ives,* 144 U. S. 408-433:

"It is also insisted that the court erred in refusing the following request of the defendant for instructions:

"If you find that the deceased might have stopped at a point 15 or 18 feet from the railroad crossing and there had an unobstructed view of defendant's track either way; that he failed so to stop; that instead the deceased drove upon the defendant's track watching the Bay City train that had already passed and with his back turned toward the approaching train, the deceased was guilty of contributing to the injury and your verdict must be for the defendant, although you are also satisfied that the defendant was guilty of negligence in the running of the train in the particulars mentioned in the declarations.

"The reason given by the court for refusing this request was that 'It is too much upon the weight of the evidence and confines the jury

to the particular circumstances narrated without notice of others that they may think important.' This reason is a sound one. In determining whether the deceased was guilty of contributory negligence the jury were bound to consider all the facts and circumstances bearing upon the question, and not select one particular prominent fact or circumstance as controlling the case to the exclusion of all others."

3. THE TRUE MEANING OF RAILROAD COMPANY'S ARGUMENT.

The true meaning of the rule contended for by the petitioner is well expressed by the trial judge thus:

> "In effect, the contention of the defendant goes to the extent of urging that in no case of a daylight automobile crossing accident, in which a view of the track can be had even though but a short distance from the rails, can there be a recovery."

We cannot believe that such is the law in any Circuit of the United States. The words of the Second Circuit Court of Appeals, in *D. L. & W. Ry.* v. *Rebman,* 285 Fed., 317, quoting with approval from *Smith* v. *N. Y. C. Ry.*, 177 N. Y. 224, seems to apply most fittingly to the case at bar.

> "The so-called crossing cases are proverbially troublesome, for there are comparatively few instances in which the facts and circumstances considered in connection with the oral testimony will lead so unerringly to a single conclusion as to permit the court to hold, as a matter of law, that contributory negligence has been established."

The petitioner is asking this court to fix a standard in law by which a court is enabled to arbitrarily say in every case of a day light automobile crossing accident in which any view of the track can be had, even though a short distance from the rails, what conduct shall be considered reasonable and prudent on the part of the driver of the automobile under any and all circumstances. This court in *The Grand Trunk Railway Company of Canada* v. *Albert Ives, Administrator,* 144 U. S., at page 417, state that there is no such "fixed standard." The court says:

> "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care under any and all circumstances."

The impossibility of fixing such a rule today is as apparent as it was when the Supreme Court spoke in the Ives Case.

4. CONCLUDING ARGUMENT.

The earliest enunciation of the rule to govern this class of cases was in the case of the *Continental Improvement Company* v. *Stead,* 99 U. S., 161-165, in which Mr. Justice Bradley took occasion to remark that:

> "We think the Judge was perfectly right, therefore, in holding that the obligations, rights and duties of railroad and travelers upon intersecting highways are mutual and reciprocal, and no greater degree of care is required of the one than of the other. For, conceding that the railway train has the right of precedence of crossing, the parties are still on equal terms as to the exercise of care and diligence in regard to their relative duties. The right of precedence

referred to does not impose upon the wagon the whole duty of avoiding a collision. The duty of the wagon to yield precedence is based upon this condition. Both parties are charged with the mutual duty of keeping a careful look-out for danger; and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty."

An examination of the cases cited by petitioner show that each and every one of them were decided under the peculiar facts thereof, just as the case at bar was decided under the peculiar facts of this case. In all of them the facts were so different from the case at bar, the speed of the train and automobile so different, the view to be held so much greater in most of them from 40 to 75 feet from the track, that no useful purpose can be served in discussing them. We firmly believe that the facts in the cases cited by the petitioner showed that the injured party was so clearly guilty of contributory negligence, that every Court would so have held in those particular cases.

The attitude of the petitioner is well expressed in the closing words of Mr. Justice Bradley in *Continental Improvement Company* v. *Stead, supra*:

> "The mistake of defendant's counsel consists in seeking to impose upon the wagon too exclusively the duty of avoiding the collision and to relieve the train too entirely from responsibility in the matter."

Respectfully submitted,

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